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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

DALE L. HODDER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

1. Whether imposition of a financial penalty in the form of punitive damages for failure to conform to a legal standard not promulgated until after the time of the conduct for which the penalty is imposed violates the Due Process Clause of the Fourteenth Amendment.

2. Whether subjecting a defendant in a civil action to unlimited monetary punishment violates the Due Process Clause of the Fourteenth Amendment.

3. Whether the Excessive Fines Clause of the Eighth Amendment applies to the award of punitive damages in civil actions and, if so, whether the $4,000,000 punitive damage award in this case violates that Clause.*

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* In addition to the parties named in the caption to this petition, Pioneer Rim & Wheel Company, Remer Oil Company, Inc., Acheson Tire Company, Arrowhead Equipment Company, Itasca Tire Company, and Motor Wheel Corporation, a wholly owned subsidiary of The Goodyear Tire & Rubber Company ("Goodyear"), were also defendants at the trial in this case. Goodyear and Motor Wheel were the only defendants that prosecuted an appeal to the Supreme Court of Minnesota. Respondent Hodder pursued a cross-appeal in that court that raised no federal questions. Motor Wheel is not a party to this Petition because punitive damages were assessed only against Goodyear.

Goodyear has no parent company and has the following subsidiaries or affiliates that are not wholly owned: Brad Ragan, Inc.; South Pacific Tyres, N.Z., Ltd.; Nitriflex, S.A. Industria e Comercio; and Goodyear Canada, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

The May 6, 1988 decision of the Supreme Court of Minnesota in this case imposed a $4,000,000 punitive damage assessment on Goodyear for failure to conform to a standard of conduct that had never been recognized by that court. That court made a purely subjective, *ad hoc* determination of the magnitude of this penalty without any meaningful statutory or other constraint on the outside limit of such awards. These actions manifestly deprived Goodyear of its right to due process under the Fourteenth Amendment and its right to be free from excessive fines under the Eighth Amendment. They raise issues of wide-

spread significance in nearly every jurisdiction in the Nation.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Minnesota affirming the judgment of the trial court with respect to liability and compensatory damages and imposing a punitive damage award of $4,000,000 is reproduced in App. A, 1a-30a, and is reported at 426 N.W.2d 826 (Minn. 1988). The order of that court denying Goodyear's Petition for Rehearing is unreported and is reproduced in App. B, 31a-33a. The order of that court staying execution of the punitive damage portion of the judgment is unreported and is reproduced in App. C, 34a-35a.

JURISDICTION

The decision of the Supreme Court of Minnesota was announced on May 6, 1988. Goodyear's Petition for Rehearing was denied on July 25, 1988. As discussed more fully below, each of the federal constitutional questions presented in this petition was properly raised in the Minnesota courts and each is therefore within this Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment provides:

> [N]or [shall] excessive fines [be] imposed . . . .

2. The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

STATEMENT OF THE CASE

A. Statement of Facts

This case challenges a $4,000,000 penalty imposed to punish Goodyear for its inadequate distribution of warnings about the risks incident to use of its tire rims. Respondent was injured when a 25-year old worn and corroded rim explosively separated while he was mounting a tire on a truck. The jury found Goodyear, the manufacturer, liable and awarded compensatory and punitive damages. The Supreme Court of Minnesota affirmed the compensatory damage verdict, but set aside the jury's punitive damage decision and entered its own punitive damage judgment based on a new theory. Goodyear was punished by that court for failure to warn of the risks of misuse of a product that (1) was sold decades earlier, (2) was neither defectively designed nor manufactured, and (3) had outlived its useful life.

The tire rim involved in this case was a two-piece K-rim assembly, more specifically, a KWX rim, manufactured by Goodyear. (The term "K rim" includes both KWX rims and KW rims. The two rims are identical in design but the KW rim is slightly heavier.) Goodyear sold this particular KWX rim assembly in 1955. App. A, 4a, 426 N.W.2d, at 829. Production of the KWX rim was discontinued in 1962. *Id.*

According to the court below, hundreds of thousands of KWX-type rims were manufactured and sold by Goodyear, and millions of tire changes occurred without incident using these rims. *Id.*, at 12a, 426 N.W.2d, at 833. The only evidence introduced at trial on this point showed that Goodyear manufactured approximately 10 million K rims and that there have been 150-200 million tire changes on K rims. Trial Transcript 6,335-36, D. Ex. 709.

The KWX rim was neither defectively designed nor defectively manufactured. *Id.*, at 20a-21a, 426 N.W.2d, at

837. Indeed, the jury expressly found that the KWX rim did not present an unreasonable risk of harm. *Id.*, at 19a, 426 N.W.2d, at 836.

It eventually became evident that KWX rims could explosively separate if not handled properly. App. A, 12a, 426 N.W.2d, at 833. Due to "improper servicing or misuse," approximately 134 K-rim explosions occurred over the years. *Id.* As a consequence, by the late 1970's Goodyear undertook an extensive program to distribute safety films, posters, manuals, advertising, and mass mailings, *id.*, at 13a, 17a, 426 N.W.2d, at 833, 835, telling of the "dangers and safety measures to be taken," *id.*, at 17a, 426 N.W.2d, at 835, relative to these rims and the "dangers associated with misassembly or use of worn parts." *Id.*, at 4a, 426 N.W.2d, at 829.

Respondent Hodder was injured in 1981 when the "corroded and worn" KWX rim he was mounting on a truck at a gas station in Remer, Minnesota explosively separated. *Id.* In response to special interrogatories, the jury found that the "useful life" of this particular KWX rim had expired prior to Hodder's accident but that Hodder was not negligent in failing to discover this fact. Special Verdict, interrogatories 15-16, App. D, 38a.

Hodder's action to recover damages for his injuries was tried to a jury in 1986. He contended that the KWX rim that had caused his injuries was defectively designed and was not accompanied by adequate warnings, and that a $12,500,000 punitive damage award should be imposed against Goodyear, computed on the basis of recalling 250,000 rims at the cost of $50 each. App. A, 19a-20a, 426 N.W.2d, at 836. The jury was instructed that

> Goodyear and Motor Wheel have the duty to give reasonable warning as to dangers inherent or reasonably foreseeable in using the KWX truck rim. If Goodyear/Motor Wheel knew or reasonably could have discovered the danger involved

> in the use of the KWX truck rim, and if the KWX truck rim was not accompanied by adequate warnings and instructions, then Goodyear/Motor Wheel is negligent.
>
> Goodyear/Motor Wheel is obligated to keep informed of scientific knowledge and discoveries in its field. Goodyear/Motor Wheel must provide adequate warnings of dangers inherent in improper use of the KWX truck rim, if the use is one that Goodyear/Motor Wheel should reasonably foresee.
>
> For a warning to be adequate, it must be set out in such a way that heeding the warning will make the product reasonably safe for use. The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.

Trial Transcript 14,043-45.

It was understood by the litigants and the trial court that this jury instruction dealt with point-of-sale warnings. Indeed, Goodyear successfully objected to Hodder's argument to the jury that liability could be imposed pursuant to a "continuing failure to warn." Trial Transcript 13,956, App. E, 39a. Thus, no jury instruction was given and no argument was made to the jury about "what the law might be," App. A, 12a, 426 N.W.2d, at 833, regarding a continuing post-sale duty to warn.[1]

While the jury determined that the rim was not defectively designed, Special Verdict, interrogatory 1, App. D, 36a, it decided that the rim "was not accompanied by adequate warnings." Special Verdict, interrogatory 3, App. D, 37a. It awarded $3,368,916 in compensatory damages and $12,500,000 in punitive damages.

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[1] Respondent Hodder specifically stated that "we are not talking about a continuing duty to warn," Transcript 13,681, App. F, 42a. Moreover,

On direct accelerated review, the Supreme Court of Minnesota affirmed liability and the compensatory damage verdict. However, the court determined that the jury's punitive damage award was predicated on a theory of failure to recall a defective product, a cause of action neither claimed by Hodder nor submitted to the jury by the trial court. App. A, 19a-20a, 426 N.W.2d, at 836. Such a theory was not only incompatible with the jury's finding that the KWX rim did not "present an unreasonable risk of harm by reason of design," *id.*, at 19a, 426 N.W.2d, at 836, but also would have raised questions of preemption under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381, *et seq.* (1982). The court concluded that it was "inescapable that the jury awarded appreciable punitive damages on a theory the jury itself had rejected." App. A, 20a, 426 N.W.2d, at 836. Thus, the court held that the "award of punitive damages cannot stand because of obvious error in the jury's calculations." *Id.*, at 20a, 426 N.W.2d, at 837.

The court went on to consider whether Goodyear could be held liable for punitive damages on another theory, *i.e.*, failure to comply with a continuing post-sale duty to warn. The court acknowledged that it had not "had occasion to deal with this question before." *Id.*, at 11a, 426 N.W.2d, at 833. Nevertheless, although the KWX rim was not defective and Goodyear had no duty to recall the rims or warn persons not to use them, the court held that Goodyear had a continuing post-sale duty in 1981 to warn of

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the Supreme Court of Minnesota expressly found that the jury instructions given did not "declare what the law might be on [the] subject" of post-sale duty to warn. App. A, 12a, 426 N.W.2d, at 833. Having recognized that the KWX rim was not defectively designed or manufactured, App. A, 20a-21a, 426 N.W.2d, at 837, and that Goodyear became aware of the danger posed by misuse of these rims "after 1955," App. A, 11a, 426 N.W.2d, at 832, the Supreme Court of Minnesota did not purport to find that Goodyear breached the duty, well established in Minnesota law, to warn of known dangers inherent in a product via point-of-sale labels and instruction manuals.

the risks associated with using them. *Id.*, at 12a, 426 N.W.2d, at 833. And, although Goodyear had disseminated warnings that were adequate in content and illustrated the risks of misuse with "devastating vividness," *id.*, at 17a, 426 N.W.2d, at 835, the "problem was that these materials received inadequate distribution." *Id.* Thus, "the manufacturer's fault here consisted of negligent failure to warn." *Id.*, at 16a, 426 N.W.2d, at 835. Breach in 1981 of this duty newly created in 1988 was held to constitute willful indifference to the safety of others and, therefore, to warrant the imposition of punitive damages.

Having thus sustained Goodyear's liability for *some* punitive damages, the Supreme Court of Minnesota purported to reduce the jury's award. However, since the court was operating under a theory not considered by the jury, in reality it assessed *de novo* "an appropriate punitive damages award [of] $4 million" for Goodyear's failure to comply with the newly announced continuing duty to warn. App. A, 21a, 426 N.W.2d, at 837. The case was remanded for the imposition of punitive damages in that amount.

Goodyear filed a timely Petition for Rehearing in the court below, which was denied without opinion on July 25, 1988. App. B, 32a. Goodyear paid the compensatory damages and filed a motion to stay execution or enforcement of the punitive damage portion of the judgment. That motion was granted by the court below on August 10, 1988, App. C, 34a, in an order that stayed execution of the punitive damages portion of the judgment until October 24, 1988.

B. Presentation of the Federal Questions

Because the Minnesota courts rejected without discussion the federal questions presented herein, Goodyear acknowledges its burden to demonstrate that these questions were properly presented to those courts and that they are therefore within this Court's jurisdiction under 28 U.S.C. § 1257(3).

1. Presentation of the Federal Due Process Challenge to the Imposition of Punitive Damages Based on a Newly Created Legal Duty

The Supreme Court of Minnesota held Goodyear liable based on a novel, retroactively applied legal standard and assessed a punitive fine of $4,000,000 for its failure to have comported with that new standard. Goodyear responded by contending in its Petition for Rehearing that its federal due process rights were violated because it was held liable based on a theory not submitted at trial, Petition for Rehearing, App. G, 44a-46a, and because the "Court's imposition of $4 million in punitive damages on a newly-recognized, unsubmitted standard of liability retroactively applied against Goodyear is abhorrent to any notion of fundamental fairness and due process of law." *Id.*, at 48a-49a & n.4, *citing, inter alia*, the Fourteenth Amendment, the Ex Post Facto Clause, and *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964). This federal due process challenge (and Goodyear's concurrent invocation of the counterpart provision of Minnesota's Constitution) was expressly predicated upon the adoption of a standard of conduct that the Supreme Court of Minnesota acknowledged it had not "had occasion to deal with . . . before." App. A, 11a, 426 N.W.2d, at 833.

Goodyear cannot have been expected to anticipate that the court below would, on the one hand, agree with it that the jury's award of punitive damages was unlawful and, on the other, assess a completely new punitive damage award for violating a substantive standard that previously had not been the law in Minnesota. It could not have asserted its due process objection to this development prior to that court's decision. Therefore, because this defense was raised at the first possible opportunity, the federal question was timely and properly raised. As this Court explained in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 86 n.9 (1979), "federal claims . . . have been adequately presented even though not raised in lower state

courts when the highest state court renders an unexpected interpretation of state law . . . ." *See also, e.g., Brinkeroff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930) (federal claim first raised on petition for rehearing in state supreme court was timely "since it was raised at the first opportunity"); *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917) (violation of Fourteenth Amendment for state supreme court to reverse trial court in such a way as to deny litigant an opportunity to present evidence; "it would leave a serious gap in the remedy for infraction of [federal] constitutional rights if the party aggrieved in such a way could not come here.").

2. Presentation of the Federal Due Process Challenge to the Imposition of Unlimited Monetary Punishment

As noted earlier, the jury in this case assessed $12,500,000 in punitive damages based upon "a theory the jury itself had rejected." App. A, 20a, 426 N.W.2d, at 836. In order to remedy this legal defect in the jury's verdict, the court below could (and should) have reversed the jury's determination and eliminated any award of punitive damages.[2] Alternatively, it might have granted a new trial to Goodyear in which the issues of Goodyear's liability for punitive damages and the magnitude of any punitive damage award would have been retried. Instead, the Supreme Court of Minnesota usurped for itself the jury's retrial function: the court made its own *de novo* assessment of the "egregiousness" of Goodyear's conduct and determined itself the appropriate punitive fine in light of the purpose of such a fine. That purpose, according to the court, is "to punish the defendant, not compensate the plaintiff who has already been compensated." *Id.*, at 20a, 426 N.W.2d, at 837.

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[2] As discussed below, because the Supreme Court of Minnesota announced a new standard of conduct in this case, it could not, consistently with due process, impose punitive damages retrospectively based upon that newly created duty.

Thus, although the court below characterized its function as involving the "reduction" of the jury's $12,500,000 punitive award, there is no doubt that the court was displacing the role of a jury in a retrial and determining on its own the amount of punishment necessary to fulfill the punitive purpose of that award. The court explained its actions in a single paragraph of its opinion that, on its face, demonstrates beyond any doubt that the Supreme Court of Minnesota alone was determining the size of the $4,000,000 award at issue in this case:

> In determining the reduction, we look for proportionality between the egregious misconduct and the amount of damages, keeping in mind "those factors which *justly bear* upon the *purpose* of punitive damages." Minn. Stat. § 549.20, subd. 3 (1986) (emphasis added). Here, first of all, the award must be substantially discounted for the erroneous per-rim recall calculation. Secondly, while the focus is on the dangerous propensity of the K-rim to explode, the egregious misconduct must, under the jury's findings, be restricted to the inadequacies of the warnings; the product itself, it must be remembered, was found not defective, neither in design nor manufacture, nor was there a complete failure to warn. It appears that the jury, in punishing the defendant, may have included factors not "justly bearing" on punitive damages. Finally, the purpose of punitive damages needs to be kept in mind, namely, to punish and deter the conduct found to be willfully indifferent to the safety of others. *We conclude, in this case, that an appropriate punitive damages award should be $4 million.* The award, therefore, is reduced from $12.5 million to $4 million.

Id., at 20a-21a, 426 N.W.2d, at 837 (emphasis added).

In this case, Goodyear attacks the $4,000,000 punitive damage award assessed *de novo* by the Supreme Court of Minnesota on the basis of its unexplained pronouncement that $4,000,000 was "an appropriate punitive damage award." As illustrated by the foregoing excerpt from the court's opinion, the court below operated in the total absence of any statutory limit or meaningful restraint on the maximum potential punishment that could be assessed against Goodyear. Although the court imposed a punitive fine of $4,000,000, "[i]t could, as well, have been almost any amount." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting).

At its first opportunity to do so—on rehearing—Goodyear expressly argued that the " 'wholly standardless discretion [of the Supreme Court of Minnesota] to determine the severity of punishment appears inconsistent with due process.' " App. G, 47a-48a, *quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment). Thus, based upon the authorities discussed in part B.1. above, Goodyear properly presented this federal question to the Minnesota courts.[3]

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[3] Although the punitive damage award at issue in this Court is the $4,000,000 award ultimately determined to be appropriate by the Supreme Court of Minnesota, Goodyear had previously argued in a post-trial motion that the trial court's vague punitive damage instruction "violated Goodyear's right of due process of law guaranteed by the United States . . . constitution[]" because, *inter alia*, the jury was given "free rein to punish Goodyear for alleged willful and wanton conduct . . . ." Brief in Support of Motion to Amend the Court's Findings, Etc., App. H, 62a. On direct appeal, Goodyear argued with respect to the $12,500,000 punitive award that

> [i]mposition of punitive damages in the absence of sufficient standards also implicates due process concerns "which in an appropriate setting must be resolved." Fundamental fairness allows punishment only for conduct contrary to well-defined standards . . . . Due process requires that Goodyear have notice that certain conduct is proscribed before it can be punished for that conduct. Section

3. Presentation of the Excessive Fines Clause Challenge to the $4,000,000 Punitive Award

As discussed in part B.2. above, the punitive damage award challenged by Goodyear in this Court is the $4,000,000 award assessed *de novo* by the Supreme Court of Minnesota in disposing of Goodyear's appeal, not the $12,500,000 jury-imposed punitive damage award which was set aside and superseded by a new penalty for a separate and newly created offense. Because the Supreme Court of Minnesota imposed in the first instance a separate, unconstitutionally excessive fine, Goodyear—in reliance on this Court's decisions in *Bankers Life* and *Aetna*—argued on rehearing that this punishment violated its rights under the Excessive Fines Clause of the Eighth Amendment (and its counterpart in the Minnesota Constitution). *See* App. G, 58a-60a. Thus, Goodyear raised its Excessive Fines Clause challenge to the $4,000,000 punitive fine imposed by the court below at the first available opportunity. This challenge was thus adequately presented to the Minnesota courts. *See, e.g., Pruneyard Shopping Center* v. *Robins*, 447 U.S., at 86 n.9.

REASONS FOR GRANTING THE WRIT

This case is but another example of cases recently coming to this Court or presently on the Court's docket in which indisputably substantial constitutional challenges to large punitive damage awards have been presented. Among

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549.20 should not be used to extend punitive damages to newly recognized causes of action . . . . Punitive damages . . . violated Goodyear's due process rights. They must be stricken.

Appellants' Brief, App. I, 65a, *quoting Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986) (other citations omitted). Thus, Goodyear consistently raised federal due process objections to the imposition of unlimited punitive damage awards from the time the jury returned its $12,500,000 verdict through the rehearing stage in the court below.

these cases, this case presents the most egregious example of the imposition of severe punishment based upon retroactive application of a newly created, substantive rule of conduct. This Court's warnings regarding the "important" constitutional implications of the infliction of punitive damages, first sounded on April 22, 1986 in *Aetna* and reiterated in *Bankers Life*, have gone and continue to go unheeded by state courts and legislatures. Only this Court can impose constitutional order on a governmentally sponsored system of punishment in which new rights to recover punitive damages are constantly being created by state courts, a system afforded only the most minimal supervision by legislatures that seem unwilling to correct the severe, arbitrary, and capricious results it produces.

A. Whether Retroactive Imposition of Punitive Damages for Failure To Satisfy a Newly Created Legal Standard Violates the Due Process Clause Presents an Important, Recurring Question That This Court Should Resolve

In exercising their wide-ranging common law authority to administer remedies for civil wrongs, state courts have the power to recognize new torts and expand the standards pursuant to which existing torts provide a right to recover damages to compensate injuries. It has long been accepted that state courts may apply new standards to conduct occurring years before and require compensation for injuries caused even if it is necessary to expand upon the permissible standards of conduct that existed at the time the tort was committed. Such a process is not necessarily unreasonable in the context of the compensatory function of tort law. Punitive damages, however, raise entirely different considerations.

In some cases, including this one, punishment in the form of punitive damages has been imposed for conduct that was not clearly labeled wrong by the courts at the time it occurred. The Constitution, however, disfavors ret-

roactive lawmaking, whether by legislatures or by courts. The constitutional hostility towards retroactive lawmaking increases as the punitive character of the law increases. For example, the Bill of Attainder and Ex Post Facto Clauses, Art. I, §§ 9, 10, create a nearly absolute ban on retroactive penal legislation, and the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit retrospective judicial enlargement of obligations imposed by the criminal law. *See, e.g., Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Although laws and judicial acts lacking punitive character are subject to less demanding review, *see, e.g., Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975), even non-punitive retroactive lawmaking is constitutionally disfavored. *See, e.g., United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (repeal of statutory assurance to bondholders violated the Contract Clause).

While punitive damages are not imposed after a criminal trial, they are clearly a form of punishment and "serve the same function as criminal penalties." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). The jury here was instructed that it could, "in addition to the other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish and deter Goodyear. . . ." App. J, 67a. The opinion of the court below unequivocally characterizes the punitive damage award it imposed on Goodyear as a form of punishment: "Punitive damages are to punish the defendant, not compensate the plaintiff who has already been compensated." App. A, 20a, 426 N.W.2d, at 837. *Accord, International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (punitive damages are "private fines levied by civil juries to punish reprehensible conduct"); *Smith* v. *Wade*, 461 U.S. 30, 68 (1978) (Rehnquist, J., dissenting) (purpose of punitive damages is to visit a punishment on defendant).

The Due Process Clause requires at a minimum that Goodyear be given clear and prior notice of the standard

of conduct it had to satisfy before it could be punished for conduct otherwise fully legal at the time. Goodyear had no notice in 1981 that it could be punished for inadequate distribution of post-sale warnings concerning a non-defective product that had outlived its useful life and had been sold over a quarter of a century earlier. Goodyear could not have ascertained from Minnesota law in 1981 that it had any post-sale duty to warn, much less what was required to satisfy that duty. A $4,000,000 punishment was imposed on Goodyear, not to compensate the respondent, but to punish and deter. Under these circumstances, the Due Process Clause prohibits the retrospective imposition of punishment. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S., at 18-19 ("we would hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness") (citations omitted).

Thus, this case squarely raises the important and recurring question whether retrospective imposition of punishment—here, a $4,000,000 punitive damage award—under a newly recognized legal standard violates the Due Process Clause. This issue was before the Court in *Aetna*, but it was unnecessary for the Court to reach it and the Court did not do so. The Court noted, however, that it is an "important issue[], which, in an appropriate setting, must be resolved." 475 U.S., at 828-29. Subsequently, the Court noted probable jurisdiction in *Bankers Life*, which also raised this issue, among others, but the Court declined to reach it on prudential grounds.

Lower courts are divided over whether punitive damages may be imposed retroactively following announcement of a new legal standard. For example, in *Vigil* v. *Arzola*, 102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), the court recognized for the first time a cause of action in tort for retaliatory discharge but refused—as a

matter of state law—to impose punitive damages on the defendant:

> Because this new cause of action imposes significant new duties, and because of reliance on the long-standing terminable-at-will rule, we hold that the new law should be given modified prospective application. Thus, we apply the law announced to the case before us, except as to punitive damages . . . .

699 P.2d, at 621-22 (citations omitted). Similarly, the Supreme Court of Oregon refused to impose punitive damages in a case in which it created a new cause of action, reasoning that "[i]f we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Nees* v. *Hocks*, 272 Ore. 210, 536 P.2d 512, 517 (1975). The Supreme Court of Illinois, following *Nees*, has held that "punitive damages should not be awarded where, as here, the cause of action forming the basis of the award is a novel one." *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 361 (1978). Even the Supreme Court of Minnesota has, in other cases, declined to impose punitive damages in a case in which it announced a new rule of law because the defendant " 'could not have anticipated beforehand the claim would even be actionable.' " *Phipps* v. *Clark Oil & Refining Corp.*, 408 N.W.2d 569, 573 (Minn. 1987), *quoting Vigil* v. *Arzola*, 699 P.2d, at 621.

In contrast, in *Peterson* v. *Superior Court*, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982), the Supreme Court of California expressly rejected state and federal constitutional challenges to retrospective allowance of punitive damages to punish the defendant for "driving while intoxicated" even though the defendant's conduct occurred before that court's decision allowing punitive damages to be assessed in such cases. *See also Multiplex Insurance*

Agency v. *California Life Insurance Co.*, 189 Cal. App.3d 925, 235 Cal. Rptr. 12 (1987) (interpreting *Peterson* to allow retroactive imposition of punitive damages based on a new cause of action); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (rejecting defendant's "fair warning" *federal* due process argument even though the applicable standards of liability were created after the product was designed, manufactured, and purchased); *Alaskan Village, Inc.* v. *Smalley*, 720 P.2d 945 (Alaska 1986) (announcing new rule of law but imposing punitive damages and declining on state law grounds to give the new rule only prospective punitive effect). Similarly, the Supreme Court of Idaho recently announced, in a case it described as being "of first impression," that a component manufacturer has a duty to warn ultimate consumers of risks associated with the finished product's use, and, despite having created a new rule of law, affirmed an award of both compensatory and punitive damages. *Sliman* v. *Aluminum Company of America*, 112 Idaho 277, 731 P.2d 1267 (1987), *cert. denied*, 108 S. Ct. 2013 (1988).[4]

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[4] Goodyear notes that the petition for writ of certiorari filed by the Aluminum Company of America made no attempt to demonstrate the depth and breadth of this frequently recurring problem and the differing approaches to it taken by various state courts as a matter of state common law and state and federal constitutional law.

As discussed above, some state courts have expressly dealt with the issues raised by the retrospective imposition of punitive damages; however, courts often impose and affirm punitive damage awards based on new standards of conduct and new rules without considering the due process issues raised by such punishment. *See, e.g., Armada Supply, Inc.* v. *S/T Nikola*, 639 F. Supp. 1161 (S.D.N.Y. 1986) (imposing punitive damages under the Carriage of Goods by Sea Act despite the Act's express statement that "in no event shall the carrier be liable for more than the amount of damage actually sustained."); *State Rubbish Collectors Ass'n* v. *Siliznoff*, 38 Cal.2d 282, 240 P.2d 282 (1952) (recognizing cause of action for intentional infliction of serious emotional distress even if plaintiff does not suffer physical injury, and affirming punitive damages); *L.F. Pace & Sons, Inc.* v. *Travelers Indemnity Co.*,

Because tort law is constantly evolving and is for the most part judicially fashioned with very little supervision by state legislatures, it is important that this Court determine whether punitive fines may be exacted in civil tort cases in which no advance notice is given of the nature of the duty or the standard of conduct, the deviation from which provides the predicate for punishment.

B. This Court Should Decide Whether Subjecting a Defendant to Unlimited Monetary Punishment Violates the Due Process Clause of the Fourteenth Amendment

Whether the imposition of unlimited punitive damages violates the Due Process Clause was one of the issues briefed and argued in *Bankers Life* but which the Court declined to reach on prudential grounds. This recurring issue is present in this case because, as discussed in part B.2. above, the Supreme Court of Minnesota claims for itself (and for Minnesota trial courts and juries) the authority to impose punitive damages in any amount, con-

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9 Conn. App. 30, 514 A.2d 766 (1986) (affirming punitive damages for bad faith breach of contract and extending the tort beyond failure to pay insurance claim to all situations where defendant acted "tortiously" in breaching a contract); *Britton* v. *Farmers Group, Inc.*, 721 P.2d 302 (Mont. 1986) (establishing that an insurer's reliance on a polygraph test or other inadmissible evidence to deny a claim is "bad faith" and affirming punitive damage award); *Nicholson* v. *United Pacific Insurance Co.*, 710 P.2d 1342 (Mont. 1985) (creating a covenant of good faith in all contracts and affirming punitive damage award for breach of a commercial real estate contract); *K-Mart* v. *Ponsock*, 732 P.2d 1364 (Nev. 1987) (recognizing a tort cause of action for "bad faith discharge" of an employee for the improper motive of defeating retirement benefits and affirming punitive damage award); *Kirk* v. *Safeco Insurance Co. of America*, 28 Ohio Misc. 44, 273 N.E. 2d 919 (1970) (nonjury trial in which an Ohio judge established right to punitive damages for breach of an insurance contract); *Atlas Chemical Industries, Inc.* v. *Anderson*, 514 S.W. 2d 309 (Tex. Civ. App. 1974) (establishing strict liability for intentional hazardous polluting and affirming punitive damage award).

sidering only whether the award will effectuate in some nebulous fashion the retributive and deterrent purposes of punitive damages. In Minnesota, as in other jurisdictions, the "open-ended and volatile nature of punitive damages," App. A, 16a, 426 N.W.2d, at 835, has resulted in a fundamentally unfair system of punishment that resembles a lottery in which defendants can neither predict the conduct that will subject them to liability nor ascertain *in advance* the amount of punishment to which they might be subjected.[5]

This case squarely raises an important issue that the Court declined to reach in *Bankers Life*. Justice O'Connor, in a concurring opinion joined by Justice Scalia, observed that the essentially unconstrained discretion vested in juries to award "unlimited" punitive damages "may violate the Due Process Clause," 108 S. Ct., at 1655, and that "the grant of wholly standardless discretion to determine

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[5] The lack of a legislatively established maximum punitive fine is compounded by the non-compensatory nature of punitive damages. Unlike compensatory damages, which are limited by the amount of damage actually done by the defendant, no "compensatory purpose limits the amount of the fine." *Hicks* v. *Feiock*, 108 S. Ct. 1423, 1437 (1988) (O'Connor, J., dissenting). Punitive damages are imposed by juries on a wholly subjective basis to regulate the future behavior of defendants and to express social outrage at the defendant's past conduct. *See Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (Powell, J., dissenting). *See also Bankers Life*, 108 S. Ct., at 1655 (O'Connor, J., concurring in part and concurring in the judgment) (noting the lack of objective factors limiting jury discretion to determine the amount of punitive damage awards). Minnesota's punitive damage statute lists a number of virtually meaningless factors to be considered in determining the level of punishment needed to achieve the retributive and deterrent purposes of punitive damages. *See Minn. Stat.* § 549.20 (1987), App. K, 69a. Some of these factors, such as "the seriousness of the hazard to the public," illustrate the essentially legislative nature of the task that juries are asked to perform when imposing punitive damages. Other factors, like the "financial condition of the defendant," raise constitutional problems in and of themselves. *Cf. Robinson* v. *California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional).

the severity of the punishment appears inconsistent with due process." *Id.*, at 1656. Justice O'Connor further suggested that this due process issue is one "that is worthy of the Court's attention in an appropriate case." *Id.*, at 1655.

This Court has, not surprisingly, expressed grave concerns over the literally unfettered discretion given to juries and courts to impose punitive damages in unlimited amounts on other occasions as well. In *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979), the Court observed:

> Because juries are accorded broad discretion both as to the imposition and the amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial.

See also Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"). Similarly, in his dissenting opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971), Justice Marshall commented that punitive damages

> [u]nlike criminal penalties, however, . . . are not awarded within discernible limits but can be awarded in almost any amount . . . these damages are the direct product of unlimited jury discretion . . . . The manner in which unlimited discretion may be exercised is plainly unpredictable.

See also id., at 84 ("the essence of the discretion is unpredictability and uncertainty); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) ("the impact of such an award is likely to be unpredictable and, at times, substantial"). As illustrated by this case, judges exercising essentially the same untrammeled discretion to punish may be expected to produce the same arbitrary results.

The establishment of a maximum punishment for a given offense has long been recognized as a quintessentially legislative task. *See United States* v. *Evans*, 333 U.S. 483, 486-87 (1947); *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911). *Cf. United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812). This Court has acknowledged that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979). The discretion to impose criminal punishment must be circumscribed by provisions that specifically "demarcate the range of penalties" and "inform . . . the courts, prosecutors, and defendants of the permissible punishment alternatives available . . . ." *Id.*, at 126. These principles are deeply rooted in our jurisprudence, and can be traced to the ancient Latin canon, "Nullum crimen, nulla poena, sine lege," the modern translation of which is: "there can be no crime, *and no punishment*, except as the law prescribes." M. Frankel, *Criminal Sentences* 3 (1972).

This same analysis must be applied to punitive damage awards because no principled constitutional distinction may be drawn between fines imposed to punish and deter based on whether they are labeled "criminal" or "civil." The protection of the Due Process Clause "is not to be avoided by the simple label the State chooses to fasten on its conduct or its statute." *Giacco* v. *Pennsylvania*, 382 U.S. 399, 402 (1966). *See also Ingraham* v. *Wright*, 430 U.S. 651, 669, n.37 (1977) ("Some punishments though not labeled criminal by the State may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."); *Burgess* v. *Salmon*, 97 U.S. (10 Otto) 381, 385 (1878) ("the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.").

Although state legislatures, including Minnesota's, have strictly observed this principle of fair warning with respect to conduct defined as criminal by establishing upper limits on criminal fines and wholly rejecting the *ad hoc* imposition of unlimited criminal fines by courts and juries, *see, e.g., Minn. Stat.* ch. 54 (1873), *as amended*, Minn. Stat. chs. 609, 624 (1987) (general codification of crimes imposing maximum fines for a variety of offenses), such has not been the case with punitive damage awards imposed under state tort law regimes. Most state statutes authorizing punitive damages simply give *carte blanche* to impose punitive awards in any amount. In a constitutional system that otherwise promises protection from capricious and extreme governmentally imposed punishments, this invitation to governmental arbitrariness is a most troubling aberration which warrants the attention of this Court in this case.

C. This Court Should Decide Whether the Excessive Fines Clause of the Eighth Amendment Applies to Civil Punitive Damage Awards and Whether the Award in This Case Is Excessive

This Court has acknowledged that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases . . . is a question of some moment and difficulty." *Bankers Life*, 108 S. Ct., at 1651. This question was briefed and argued in *Bankers Life* and in *Aetna*. The arguments advanced to the Court in those cases are fully applicable to this case because, as the Supreme Court of Minnesota recognized, the "public" purpose of punitive damages is "to punish the defendant . . . ." App. A, 20a, 426 N.W.2d, at 837.

Because punitive damages undeniably constitute "punishment for past conduct," they should be subject to the constraints of the Excessive Fines Clause. *Cf. City of Yonkers* v. *United States*, No. A-175, slip op., at 9 (Sept. 1, 1988) (Marshall, J., concurring) (slip op. issued in com-

panion cases in *Spallone* v. *United States*, Nos. A-172, -173, -174 & -175). The punitive damage award here, $4,000,000, far exceeds the maximum punishment established by the Minnesota legislature for similar conduct that has been adjudged to be a crime. Goodyear was assessed with a $4,000,000 punitive fine by the Supreme Court of Minnesota for "deliberately downplaying" the hazards of misusing the KWX rim. App. A, at 18a, 426 N.W.2d, at 836. Had Goodyear been charged under Minnesota's Consumer Fraud Act, Minn. Stat. § 325F.69 (1987), which prohibits "[f]raud, misrepresentation, [and] deceptive practices . . . in connection with the sale of any merchandise," *id.*, subdiv. 1, and found guilty thereunder, it would have been subject to a maximum fine of $3,000 for committing a gross misdemeanor. *Id.*, subdiv. 2(6); *id.*, § 609.02, subdiv. 4 (establishing maximum fines for gross misdemeanor). Thus, the punitive damage award in this case is over 1,000 times the maximum punishment established by the Minnesota legislature for misleading or deceptive statements concerning a product—essentially the misconduct for which Goodyear was punished. Such a fine, imposed by an appellate court subject to no maximum limitation as to size, is without doubt excessive under the Eighth Amendment standards interpreted and applied in *Solem* v. *Helm*, 463 U.S. 277 (1983). The Excessive Fines Clause question was properly presented below and should be given plenary consideration.

D. This Case Implicates None of the Prudential Concerns Articulated by the Court in *Bankers Life*

In *Bankers Life*, this Court articulated several prudential concerns regarding the exercise of its discretionary jurisdiction over the constitutional challenges to punitive damages presented in that case. Those concerns are not present here. In *Bankers Life*, the Court refrained from addressing constitutional challenges to a $1,600,000 punitive damage award in view of "possibly more appropriate resolutions" of the issues posed by such staggering and increasingly

frequent awards. 108 S. Ct., at 1651. The Court expressed the hope that state legislatures might act, *id.*, and in doing so cited a number of state statutes in which legislatures imposed some limits on punitive damage awards in specific types of civil cases.[6] Despite, however, the warning sounded almost two and one-half years ago in *Aetna*, state legislatures have done almost nothing to impose meaningful controls on punitive damage awards.

For example, in 1986 the Minnesota legislature enacted a "tort reform" bill, Chapter 455 of the Laws of Minnesota, which, *inter alia*, added a section concerning the pleading of claims for punitive damages. That legislation did not, however, otherwise deal directly with punitive damage awards. In 1988, the Minnesota legislature amended certain sections of the 1986 tort reform law but once again set no limits on the recovery of punitive damages. Thus, the response of the Minnesota legislature to the suggestion of constitutional concerns mentioned by this Court in *Aetna* in 1986 and again when probable jurisdiction was noted in *Bankers Life* in March 1987 has been to make minor adjustments to the law of torts in Minnesota but not to address the fundamental issues presented by the case at bar.

In *Bankers Life*, the Court expressed the hope that, failing legislative action—as here—the state courts might

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[6] 108 S. Ct., at 1651 n.3, *citing, e.g., Cal. Civ. Code Ann.* § 1787.3 (West 1985). This footnote in *Bankers Life* failed to recognize that the California statute which generally authorizes the recovery of punitive damages in civil actions, *Cal. Civ. Code* § 3294, was substantially amended on September 30, 1987 as part of a larger "tort reform" bill. In the process of amending § 3294, the California legislature did not act to place limits on such awards. *See* Senate Bill No. 241, enacted as ch. 1498, Acts of the California Legislature (Sep. 30, 1987). The fruits of such unbridled discretion are illustrated by the $14,000,000 punitive damage award discussed in the Application for Stay in *Metromedia, Inc.* v. *April Enterprises, Inc.*, No. A-242, *stay granted*, Oct. 11, 1988, *pet. for cert. filed*, Oct. 14, 1988.

resolve these issues through reliance on their state constitutions or other non-federal grounds. 108 S. Ct., at 1651. Although a plurality of the Supreme Court of Georgia had already done so in a case recently on this Court's docket,[7] the Minnesota courts in this case shunned that opportunity. At each stage of this case, Goodyear invoked—to no avail—appropriate provisions of the Minnesota Constitution.

The Minnesota courts are not alone in their apparent indifference to these important constitutional issues. In *April Enterprises* v. *Metromedia, Inc.*, No. B022890 (Cal. Ct. App. June 9, 1988) (unpublished opinion), No. A-242, *stay granted*, Oct. 11, 1988, *pet. for cert. filed*, Oct. 14, 1988, the California Court of Appeal affirmed a punitive damage judgment of $14,000,000. After both parties had, on rehearing, joined issue in the Court of Appeal on the import of *Bankers Life* for the punitive damages system, the defendant's state and federal constitutional claims were once again rejected by the Court of Appeal. With a single dissenting vote, the Supreme Court of California refused even to grant review of the largest punitive damage award ever affirmed on appeal in that state. In a similar vein, on April 21, 1988 the United States Court of Appeals for the Second Circuit affirmed a $6,000,000 punitive damage award in an opinion devoting four sentences to the defendants' argument that the award was excessive under the Eighth Amendment. *Kelco Disposal, Inc.* v. *Browning-Ferris Industries*, 845 F.2d 404 (2d Cir. 1988), No. 88-

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[7] *Colonial Pipeline Co.* v. *Wright Contracting Co.*, No. 87-2007, *dism'd for want of juris.*, Oct. 3, 1988. The judgment in that case did not appear to be final for purposes of the exercise of this Court's appellate jurisdiction. This Court also has on its docket another case, *Nationwide Mutual Insurance Co.* v. *Clay*, No. 88-157, *pet. for cert. filed*, July 27, 1988, which presents several of these issues. These issues are also presented by the petitioner in *CNA Casualty of California* v. *Rouche*, No. 88-297, *pet. for cert. filed*, Aug. 18, 1988.

556, *pet. for cert. filed*, Oct. 1, 1988.[8] Fully six weeks after the decision in *Bankers Life*, the Eleventh Circuit responded to this Court's invitation by rejecting—albeit in *dicta*—the Eighth Amendment's applicability to punitive damage awards, viewing the question, as many courts have viewed it, as foreclosed by the Court's decision in *Ingraham* v. *Wright*, 430 U.S. 651 (1977).[9] *Electro Services, Inc.* v. *Exide Corporation*, 847 F.2d 1524, 1530 (11th Cir. 1988). And on September 30, 1988, the Supreme Court of Alabama followed suit, holding that "punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, which applies to criminal proceedings only." *Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381 & 86-385 (Ala. Sept. 30, 1988), slip op., at 9.

State legislatures and lower courts have repeatedly declined to respond to concerns such as those suggested by this Court in *Aetna* and *Bankers Life*, and have, consequently, refused to ameliorate the serious constitutional difficulties posed by punitive damages. It is apparent that state legislatures will not enact limits on punitive damages and that state courts will continue to regard federal con-

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[8] In its opinion, the Second Circuit was prepared to assume the applicability of the Eighth Amendment but went on to hold that the award would not in any event be violative of the Eighth Amendment if that assumption were correct.

[9] In this respect, the Eleventh Circuit joined a number of other courts that have, without any reasoned analysis, concluded that *Ingraham* v. *Wright*, 430 U.S. 651 (1977), is dispositive against applying the Eighth Amendment's proscriptions to punitive damage awards. *See, e.g., Federal Deposit Insurance Co.* v. *W.R. Grace & Co.*, No. 84-5031 (N.D. Ill. June 6, 1988); *Downey Savings and Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *Tetuan* v. *A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987); *Unified School District* v. *The Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981); *Underwriters Life Insurance Co.* v. *Cobb*, 746 S.W.2d 810 (Tex. Civ. App. 1988).

stitutional challenges to punitive damage awards as precluded by this Court's jurisprudence in cases such as *Ingraham* v. *Wright*. The time has surely come for the Court to follow through on its clear warnings to state courts and legislatures by setting this case for argument and plenary consideration.

CONCLUSION

The questions presented by Goodyear are substantial and recurring. Punitive damages in severe and excessive amounts, imposed for violating vague and unannounced substantive standards of conduct, are wreaking havoc within the civil justice system throughout this Nation. The Petition should be granted and these questions set for plenary consideration.[10]

October 14, 1988

Respectfully submitted,

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[10] If the Court desires to consider together the full panoply of federal constitutional questions posed by punitive damage awards, this case should be set for argument in tandem with *Metromedia, Inc.* v. *April Enterprises, Inc.*, No. A-242, *stay granted*, Oct. 11, 1988, *pet. for cert. filed*, Oct. 14, 1988. Counsel for Goodyear herein are also counsel for petitioner Metromedia, Inc. in that case.

APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419, C2-87-511

Hennepin County — Simonett, J.
Took no part, Coyne, J.

Dale L. Hodder,

Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company, et al., defendants, petitioners,

Appellants (C3-87-419),
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondent,

and

The Goodyear Tire & Rubber Company, defendant and third party plaintiff, petitioner,

Appellant (C3-87-419),
Respondent (C2-87-511),

vs.

Remer Oil Company, Inc., third party defendant,

Respondent,

and

Pioneer Rim & Wheel Company, defendant and third party plaintiff,

Respondent,

vs.

Acheson Tire Company, third party defendant,

Respondent,

Arrowhead Equipment Company, third party defendant,

Respondent,

Itasca Tire Company, third party defendant,

Respondent.

Filed May 6, 1988
Office of Appellate Courts

SYLLABUS

1. Minn. Stat. § 604.03 (1986), the useful life defense, is not a statute of repose. In this case, the manufacturer had a continuing duty to warn and this issue was adequately submitted to the jury. Other evidentiary rulings were proper.

2. Punitive damages, based in part on an erroneous theory, are reduced. The employer's recovery for medical expenses under Minn. Stat. § 176.061, subd. 7 (1981), is calculated within the subdivision 6 formula.

3. No valid settlement offer was made under the offer-counteroffer provision of the prejudgment interest statute, and, therefore, preverdict interest applies to the entire compensatory judgment.

Affirmed in part, reversed in part, and remanded with directions.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

This products liability case raises a variety of issues, including interpretation of the statutory "useful life de-

fense," the duty to warn, and entitlement to punitive damages. Issues on allocation of a tort recovery between the injured employee and subrogated employer, as well as on prejudgment interest, are also presented. We affirm, for the most part, except for a reduction in punitive damages and a remand for reallocation of the tort recovery and readjustment of interest.

On December 19, 1981, plaintiff Dale Hodder, age 17, was seriously injured when the metal rim of a truck tire explosively separated while he was mounting the tire on a customer's logging truck. Hodder was then employed by Remer Oil Company, a service station in the small community of Remer in northern Minnesota. Hodder remembers he was to fix a flat tire on the truck but remembers little else.

The tire that exploded was mounted on a KWX multipiece rim assembly made by defendant Goodyear Tire & Rubber Company.[1] This assembly consists of a heavy metal rim base, about which the tire with an inner tube is placed, plus a separate metal side ring that attaches to the rim. The rim base is split to facilitate getting the tire on and off; on assembly, the split ends must be carefully realigned and the side ring then fastens to and helps lock the rim base. There were other tires on the truck with an "L-type" rim. The L-type, in contrast with the K-rim, has a solid rim base but the side ring is split.

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[1] The flat tire Hodder was to fix was apparently an inner dual wheel. What is uncertain is whether the KWX rim was on the inner or outer dual. The jury could have found the accident happened one of two ways. The first version assumes the KMX rim was on the flat inner dual. Hodder had removed, repaired, and reassembled the flat tire and the repaired tire exploded as Hodder was remounting the wheel to its inner duel position. The second version assumes the KWX rim was on the nonflat outer dual. Hodder had removed this wheel to get at the flat inner dual (which had an L-type rim), and the outer dual wheel exploded as Hodder was remounting it after having remounted the repaired inner dual.

The K-rim which injured Hodder was manufactured in 1955, 26 years before the accident. The rim was corroded and worn but there was also evidence the component parts were in serviceable condition at the time of the explosion. Goodyear had been making K-rims since the 1920's, and possibly a quarter million are still in circulation. Manufacture of the KWX was discontinued in 1962. After 1955, Goodyear became aware of the danger of pressurized separation of its multi-piece rim assemblies. By the 1970's, Goodyear was using safety films, posters, manuals, advertising, and promotion of OSHA standards to make known information on maintenance and repair of K-rims and to warn about dangers associated with misassembly or use of worn parts. Hodder never saw any of this material.

In 1955, Goodyear was producing and selling K-rims and L-rims. The KWX rim (the kind involved in Hodder's accident) was a K-rim with a lighter rim base, put on the market in 1955, apparently for use, as was the L-rim, for lighter load trucks; however, in later years both the KWX and the L-rim came to be used generally on heavier load trucks. A single-piece rim was invented in 1953 but not until some years later did it gain acceptance in the industry and on the market.

Dale Hodder sued Goodyear and its subsidiary, Motor Wheel Corporation, and the defendants, in turn, brought in Remer Oil Company, plaintiff's employer, as a third party defendant. Remer Oil counterclaimed for benefits it was required to pay for its employee under the Workers' Compensation Act.

During trial, plaintiff dropped its claim of a manufacturing defect. The jury, answering special interrogatories, found no design defect in the K-rim; no negligence on Hodder; 42.5 percent causal negligence each on Goodyear and Motor Wheel, and 15 percent negligence on Remer Oil. Goodyear and Motor Wheel's negligence was found to

be for failure to warn. The jury awarded compensatory damages of $3,368,916 and punitive damages of $12.5 million. The jury also found that the "useful life" of the involved KWX rim had expired at the time of Hodder's accident and that Hodder was not negligent in failing to determine that the useful life had expired. Goodyear and Motor Wheel appeal from a denial of their post-trial motions and the judgment, and Hodder appeals the allocation of his tort recovery and an interest item. We granted accelerated review to this court.

I.

Minn. Stat. § 604.03, subd. 1 (1986), provides that in a products liability action, "it is a *defense* to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the *ordinary useful life* of the product." (Emphasis added.) Subdivision 2 states, "The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user." The subdivision goes on to say this period "shall be determined by reference to the experience of users of similar products," and then lists some of the factors to be taken into account.[2]

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[2] Subdivision 2 of section 604.03 reads in its entirety:

> The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, man-

In this case the statute was read to the jurors, and, in answer to special questions, the jury found that the K-rim's useful life had expired and Hodder was not negligent in failing to have determined the useful life had expired. In denying Goodyear's post-trial motions, the trial court ruled that the useful life defense was inapplicable because, the jury having found the K-rim was not accompanied by adequate warnings, there never was a period during which with reasonable safety the rim was useful to the user. In other words, by the statute's own definition, the K-rim never had a useful life.

Hodder, of course, agrees with the trial court's ruling. Alternatively, Hodder argues the useful life defense is simply one factor for the jury to consider in determining fault. Goodyear, on the other hand, says the useful life defense is just that, a defense, a complete bar to any injury occurring after the useful life of the product has expired. Both parties select remarks made in the legislative hearings on the useful life defense which support their position. We think the legislative history is inconclusive, but this much is certain: The legislature was concerned about expanding products liability and intended to limit open-ended liability for aging products. The question for us is to what extent that purpose has been accomplished.

Section 604.03 is not a typical statute of repose. A statute of repose starts the limitation period for bringing an action from the date of manufacture or sale of the product, unlike a statute of limitations which starts from the date of injury. A typical statute of repose will specify a presumptive number of years after which an action cannot be brought.[3] Here, however, the limitation period is deter-

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ufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user.

[3] Six states have useful or anticipated life provisions in their products

mined by the trier of fact after injury occurs. The jury makes this determination by "reference to users of similar products," and takes into account, among other things, natural deterioration, progress of the art, climatic and other peculiar local conditions, repair practices, the useful life as specified by the manufacturer, and any user modification.

The statute's useful life concept is ambiguous. It is not clear if useful life refers to the life of the particular product involved which caused the injury, or if the life of that particular product is to be measured by the useful life of all like products made by that particular manufacturer, or by the life of some generic product or industry norm. The statute seemingly tries to encompass all three approaches, but this presents problems. The particular product involved in the accident may conceivably have several different life spans depending on which measurement is used.

There are other problems. The statute surely is meant to cover a product originally nondefective but which becomes "defective" with age. But how long must a product last to avoid being labelled originally defective? Does the statute also cover an originally defective product? A product may be defective *ab initio*, but not cause injury until

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liability statutes. In five states, the useful life is coupled with a presumptive period (or, in Connecticut, is an exception to a statute of repose) and expiration of the useful life unambiguously bars recovery. Conn. Gen. Stat. § 52-577a (1987); Idaho Code, § 6-1403(2) (Supp. 1987); Kan. Stat. Ann. § 60-3303 (1983); Tenn. Code Ann. § 29-28-103 (1980); Wash. Rev. Code § 7.72.060 (Supp. 1987). Arkansas explicitly provides that use of a product beyond its "anticipated life" is an element of comparative fault. Ark. Stat. Ann. § 16-116-105 (1987). Minnesota appears to be the only state that simply labels expiration of useful life as a "defense."

One effect of a statute of repose is that it has the potential of barring recovery even before the cause of action accrues. This raises constitutional questions, briefed by the parties, but which we do not reach.

the normal life span of a nondefective like product expires. If these products are not covered, as the trial court ruled, the useful life statute is irrelevant to most products liability claims.

These problems, in turn, raise questions about the role of the user of the product (who may be the owner, a temporary user, or a hypothetical average person) in determining the product's useful life. Hodder points out the useful life definition relies on many of the same factors used to prove design defect, manufacturing defect and failure to warn, with the odd result that the same evidence is used to support a cause of action and to defeat it. Nevertheless, this may be exactly what the legislature intended. But Hodder also seems to say that the useful life defense incorporates a "reasonable person" standard of care, *i.e.*, the defense is not operative unless the plaintiff user knows or should know the product is no longer reasonably safe to use. Goodyear counters by saying section 604.03 must be viewed as a statute of repose, *i.e.*, the defense focuses entirely on the condition of the product and has "nothing to do with a person's conduct." Further, because the defense applies to "any action," even a user's injury attributable to a manufacturer's failure to warn is barred after the product's useful life has expired.

Notwithstanding Goodyear's claim, it seems to us that section 604.03 does have something to do with the particular person who is using the particular product. Useful life is the period the product is "useful to the user." *Id.*, subd. 2. A factor to be considered is "the policy of the user * * * as to repairs, renewals and replacements." *Id.* Another factor is "any modification of the product by the user." *Id.* A review of the legislative hearings also suggests that the legislature thought the obviousness of a product's deterioration to the particular user might be a consideration in determining useful life.[4] Significant, too,

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[4] For example, Senator Spear inquired in committee how the con-

is the fact that the legislature first considered and abandoned a true 15-year statute of repose, H.F. 338, § 3, 70th Legis., 1977 (second House reading, April 18, 1977), and instead adopted a useful life concept derived from a 1977 federal task force study on products liability. *See* U.S. Dept. of Commerce, *Final Report, Interagency Task Force on Product Liability* (1977). The final report, with cursory analysis, endorsed the useful life concept, but the task force's legal study specifically recommended only that manufacturers utilize a notice disclaiming liability for a product after a specific period of time. The legal study contrasted the "useful-life-disclaimer approach" with more "drastic" statutes of repose, reasoning that "[i]f a claim is to be barred before the injury occurs, it seems more equitable to ensure that the employee or consumer knows that he is using the product at his own risk, and that if he is injured, there will be no recovery against the manufacturer." *Id.* at 28-29. Interestingly, section 604.03, subd. 2, includes among the factors determining useful life the manufacturer's notice of the product's useful life.

This much is clear. There will be cases where a reasonably prudent user should know a product's useful life has expired and instances where the user has no reason to know nor way of knowing. Goodyear argues that in either case, the user is barred from recovery. We decline to adopt this construction. Expiration of useful life is a defense but we think the legislature has stopped short of saying it is an absolute defense, and it is not for us to

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sumer determines when useful life ends, and "what * * * a prudent consumer [does] under this kind of a provision to take reasonable precautions not to use a product when useful life has worn out." (Committee Hearing, Feb. 1, 1978). Senator Davies responded with a hypothetical lawnmower user who allows the muffler to rust off but continues using the mower until he becomes deaf. The user would have no claim for ear damage against the lawnmower or muffler manufacturer. The clear implication is that the deterioration was obvious to the user, who failed to exercise reasonable care in continuing to use the product.

take that step, especially in view of the mixed signals given by the statute.

We hold, therefore, that the expiration of a product's useful life under section 604.03 is a factor to be weighed by the jury in determining the fault of the manufacturer and the fault of the user. In other words, the statute emphasizes to the trier of fact the importance, in determining comparative liability, of considering whether the product has outlived its useful life. Section 604.03 should be read to the jury as part of its instructions, perhaps with a prefatory statement that the statutory defense, if found to be applicable, is to be considered, along with other factors, in evaluating the conduct of the manufacturer and the user. There is no need for separate special verdict questions as were given in this case on useful life. The jury's evaluation of the useful life defense will be reflected in its answers to the special verdict questions on fault.

In this case, the jury found, in answer to a superfluous question, that the K-rim's useful life had expired. This answer is not inconsistent with the jury's findings of fault. The jury would have weighed the useful life expiration along with all the other liability aspects of the case in finding Hodder not negligent, Goodyear negligent, and in comparing Goodyear's fault with Remer Oil's fault. This was proper.

How to limit open-ended liability for aging products is perplexing. The useful life approach seems, at first glance, attractive, but as one commentator has noted, on closer study, these statutes "seem incoherent both theoretically and operationally." Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L. Rev. 796, 848 (1983). Indeed, the author wonders if it is possible to devise a workable repose statute that measures the time period by a useful life concept. It may be that such a statute is feasible, but until that time arrives, the courts

apparently, as Professor Schwartz suggests, will simply have to monitor motions for directed verdicts closely in cases of aging products.

II.

The jury was asked whether Goodyear was negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX rim, and the KWX truck rim was not accompanied by adequate warnings. The jury answered the question "yes" and then found this negligence was a cause of Hodder's injuries.[5] Goodyear contends that it had no post-sale, continuing duty to warn; but if it did, it complied with that duty; but in any event any failure to warn was not a cause of Hodder's injuries.

If safety hazards in the use of K-rims did not become known to Goodyear until after 1955, after the K-rim which injured Hodder was made and sold, did Goodyear have a post-sale duty to warn Hodder and other similar users? We have not had occasion to deal with this question before. Jury instruction Guide 119 says a manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field, and a committee comment states that "the knowledge should be judged at the time the product in question is manufactured." 4 Minn. Dist. Judges Ass'n,

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[5] Similar questions were submitted for defendant Motor Wheel Corporation and answered affirmatively, the jury then assigning 42.5 percent causal fault to Goodyear and 42.5 percent to Motor Wheel. The defendants argue that because Motor Wheel did not manufacture or sell the KWX rim, it had no duty to warn of the product's danger. Motor Wheel manufactures a variety of wheel products but not K-rims, but it became a wholly-owned subsidiary of Goodyear in 1964 and thereafter handled the marketing of the K-rim. The evidence amply established that Motor Wheel assumed a duty to warn about K-rims, which it shared with Goodyear. We hold the trial court did not err in submitting duty to warn as to Motor Wheel. In this opinion, for brevity, whenever we refer to Goodyear, this includes Motor Wheel, unless the context or text otherwise indicates.

Minnesota Practice, JIG 119 (3d ed. 1986). Goodyear argues this means post-sale knowledge of danger is not a basis for a duty to warn. JIG 119 seems to be drafted with time-of-sale warnings primarily in mind, but it does not purport to preclude a post-sale duty to warn nor to declare what the law might be on that subject.

On the facts of this case, we hold that a continuing post-sale duty to warn existed and was adequately submitted. *Cf. Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959). Hundreds of thousands of K-rims have been used in millions of tire changes over the years without incident; of the 134 or so K-rim explosions which did occur, many are explained by improper servicing or misuse. Goodyear steadfastly maintains its K-rim is a safe product if used properly. Nevertheless, it became evident by the late 1950's that K-rims could be temperamental; that the margin for error in servicing the K-rim assembly was dangerously small and it might explosively separate with seemingly little provocation; that when explosions did occur, serious injury or death usually resulted; and, therefore, that great care was required in the handling and servicing of K-rims. Further, Goodyear has continued over the years in the tire rim business, and, although all K-rim production was discontinued by 1969, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seems to us that Goodyear had a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.

The trial court instructed the jury, using the JIG instruction, that if there was a duty to warn, "and if the KWX truck rim was not *accompanied* by adequate warnings and instructions, *then* Goodyear/Motor Wheel *is* neg-

ligent." (Emphasis added.) This instruction, contends Goodyear, in effect directed a finding of negligence because, admittedly, there was no warning on Hodder's K-rim. In other words, Goodyear construes the word "accompany" to mean the warning must be affixed to or somehow go along with the tire rim. Goodyear argues persuasively that affixing warnings to the rim itself, having in mind the rough wear to which rims are put, was impractical; and, anyway, that the rim injuring Hodder was already in circulation. Moreover, argues Goodyear, the trial court's instruction made irrelevant all the evidence it introduced of its subsequent warning efforts made through safety films, posters, manuals, and advertising. We concede, in the context of this case, that the word "accompany" is inapposite, but we are satisfied that as the evidence was adduced and the arguments were made during this long trial, the jury did not give a narrow, technical interpretation to the court's instruction but understood the warnings, as JIG 119 states, were to be "set out in such a way" as to "catch the attention" of the ordinary user.

Goodyear also says it had no duty to warn because Hodder knew or should have known of the K-rim danger. While Hodder had received training in the servicing of multipiece rims, his appreciation of the inherent dangers involved was not so perfect as to absolve Goodyear as a matter of law of its duty to warn.[6]

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[6] The 1973 Smith internal company report states in part:

> In the eyes of the user community, the [K-rim] part is a secondary component. It is a sturdy, heavy part, made of steel. He, therefore, thinks it has an unlimited useful life. * * * *
>
> We have expert knowledge with regard to maintenance. Such information is published, but the information may not reach the involved user. If it does, he apparently doesn't see any reason for it. We do not follow up published information with personal contact to show how and the reason why.
>
> We have expert knowledge with regard to serviceability (pos-

Goodyear did, in fact, recognize a continuing duty to warn and, by the late 1970's, before Hodder's accident, it distributed warnings and instructions by means of safety films, posters, manuals, and advertising. The jury, however, could have found that Goodyear's warnings were inadequate to reach K-rim users. We hold the jury's finding that Goodyear was negligent in performing its duty to warn is sustained by the evidence. While a closer question, we also hold the jury could find that breach of this duty was a cause of Hodder's injuries. *Cf. Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 99 (Minn. 1987).

III.

The jury found Remer Oil 15 percent at fault. Goodyear argues that the percentage of fault would have been greater but for erroneous jury instructions. Remer, on the other hand, by notice of review, contends as a matter of law it was not at fault.

Hodder may or may not have changed a flat tire mounted on a K-rim, depending on which version of the accident the jury accepted. *See* footnote 1, *supra*. If the K-rim was on the outer, nonflat dual, there was evidence (fresh hammer marks on the rim) indicating Hodder had improperly hammered the rim to return the wheel to the axle. If the K-rim was on the flat inner dual, there was evidence Hodder had improperly serviced the rim. In either event, Remer Oil's negligence in training Hodder was a fact issue. The trial court also instructed the jury, over Goodyear's objection, that Remer Oil's possible OSHA vi-

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sibly negative type of knowledge). Such information is not detailed in our publications. The involved user cannot tell a "good" part from a "bad". He doesn't believe the part won't function (provide support for the tire). He doesn't believe it will endanger him. Even if he feels it is unserviceable, he may not be able to replace it due to owner['s] or his bosses['] instructions; or a replacement may not be available. He may be willing to take a chance because he can't afford a new rim, or he's in a hurry.

olations were excused if Remer had justification for being unaware of the regulations. This was not error. *See* Restatement (Second) of Torts § 288A (1965). Remer Oil's justification for being ignorant of the OSHA regulations was a fact for the jury to consider and the jury was not forced, as Goodyear contends, to absolve Remer of liability because it was unaware of the OSHA regulations.

We find no error either in various evidentiary rulings challenged by Goodyear. Evidence of 134 post-1955 K-rim explosion accidents was offered by Hodder. This evidence was relevant on notice to Goodyear of the K-rim's dangerous propensities and the warnings needed. The fact other accidents may have been caused by misuse does not diminish their relevance on failure to warn. *Cf. Wagner v. International Harvester Co.*, 611 F.2d 224, 230-31 (8th Cir. 1979). We think, too, a sufficient foundation for admission of testimony about the other accidents was laid (7 days of pretrial were devoted to foundation), and, while Hodder's expert gave only summaries of the accidents, Goodyear extensively cross-examined the expert using the full files. In admitting the reports of other accidents, the trial court did not exceed its allowable discretion.

In 1979 Lynn Bradford, acting director of the Office of Defects Investigation in the United States Department of Transportation, wrote a letter to Goodyear strongly recommending that Goodyear voluntarily recall the remaining K-rims from service. Goodyear considered initiating a recall but then declined, apparently disagreeing whether the K-rim had, as Bradford put it, "an inherent safety defect." The trial court admitted the Bradford letter over Goodyear's objections that it was only Bradford's conclusory opinion, untrustworthy, not a factual finding by the government, and therefore, hearsay inadmissible under the Minn. R. Evid. 803(8)(C) (1979) exception to the hearsay rule. The jury understood, however, that Bradford's letter was not a formal governmental finding binding on Goodyear, and we cannot say the trial court abused its discre-

tion in admitting the letter. *Cf. In re Multi-Piece Rims Prods. Liab. Litig. M.D.L. No. 362*, 545 F.Supp. 149 (W.D. Mo. 1982) (Bradford letter ruled admissible, under Fed. R. Evid. 803(8), with proper cautionary instructions). We have also reviewed Goodyear's claims of error with respect to admission of OSHA regulations, expert testimony, and the Hodder video tape demonstration of a K-rim explosion, and we find these rulings were within the proper exercise of the trial court's discretion.

IV.

Goodyear challenges the $12.5 million punitive damages award. For there to be punitive damages the defendant must have acted with "willful indifference to the * * * safety of others" and this conduct must be established by clear and convincing evidence. Minn. Stat. § 549.20 (1986); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980). Because of the open-ended and volatile nature of punitive damages, this court exercises "close control over the imposition and assessment of punitive damages." *Lewis v. Equitable Life Assurance Co.*, 389 N.W.2d 876, 892 (Minn. 1986) (quoting another source). We conclude punitive damages are proper but in a lesser amount.

In *Gryc* we upheld a $1 million punitive damages award against the manufacturer of a highly flammable cotton flannelette, where the manufacturer, even though flame-retardant cotton was available, persisted in marketing its flammable product because it was more profitable. In *Gryc*, then, the willful indifference consisted of continued marketing of a defectively manufactured product. In this case we do not have a defectively manufactured product nor do we have a defectively designed product; rather, the manufacturer's fault here consisted of negligent failure to warn. The question, then, is whether Goodyear's conduct in failing to warn rose to the level of willful indifference.

This is not a case where the manufacturer gave no warnings. Goodyear did warn, and its warning message,

insofar as content, was generally adequate. For example, Goodyear's safety film showed a K-rim tire exploding into a dummy figure with every bit as much devastating vividness as Hodder's own video trial demonstration. Goodyear's posters, manuals, and mass mailings told of the dangers and safety measures to be taken. The problem was that these materials received inadequate distribution. Over a 10-year period, for example, it appears Goodyear's sales representative visited only 26 towns in all of northern Minnesota with literature on K-rim dangers. In large part, too, Goodyear left the initiative to tire shops to write in for safety material in response to its ad in trade journals.

So the issue becomes whether Goodyear's inadequate distribution of K-rim warnings was willfully indifferent. By 1962, Goodyear had discontinued production of the KWX and by 1969 it had discontinued production of all K-rims. Goodyear withheld some accident reports and told the Department of Transportation that production had been discontinued for commercial reasons, whereas the jury could have found it was because of growing concern over explosions. In 1972, Goodyear's chairman expressed concern about protecting the tire and tube market which was dependent on multi-piece rims, and K-rims in stock continued to be sold. In 1973, the Smith study reported K-rims were inherently dangerous. Not until 1974-75 did Goodyear undertake a warning program, but then budgeted only about $100,000 a year for this purpose, after company objections "to us[ing] advertising dollars for projects which are not advertising or product promotion." In 1976-77, Goodyear offered a Rim Safety Exchange Program, offering to take in used K-rims on purchase of a new L-rim at a discount, but the discount was unrealistically small; only four K-rims were turned in nationwide and the program was abandoned. In 1979, Goodyear balked at the government's re-

quest for a voluntary recall and instead pushed for OSHA regulations.[7] Not until 1983 did Goodyear have the OSHA regulations in its catalog. While Goodyear itself described the K-rims as dangerous if not used properly, it explained its less-than-efficient distribution of warnings by saying you cannot reach everybody. While Goodyear warned that tire assemblies explode with disastrous effect—a fact not unknown and common to all rims—Goodyear's warnings usually neglected to single out the special hazards of the K-rim. We conclude there was evidence from which the jury could find that Goodyear deliberately downplayed and obscured the dangers of the K-rim to protect its tube and tire sales and thereby exhibited willful indifference to the safety of others.

Goodyear argues that punitive damages were awarded, however, not for failure to warn but for failure to recall, which it says is legally impermissible.[8] "The question," responds Hodder, "is not whether there is a cause of action at common law for failure to recall, but simply whether the failure to give consumer notification as a remedial measure is evidence of a failure to warn and of conduct giving rise to punitive damages." Hodder's point is well taken. Hodder never claimed a recall cause of action nor was any jury instruction given on recall.

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[7] Hodder argues that Goodyear's willful indifference is demonstrated by its "pressure" on OSHA to adopt safety regulations, so that the "liability onus" would be transferred to service personnel. We would think campaigning for OSHA regulations shows the opposite of indifference. Goodyear's indifference lies, rather, in assuming OSHA's program absolved it of pursuing a vigorous warning program of its own.

[8] Goodyear contends there is no common law duty to recall, citing *Smith v. Firestone Tire & Rubber Co.*, 765 F.2d 129, 135 (8th Cir. 1985), and hence recall affords no basis for awarding punitive damages; further, in any event, that a punitive damages award based on recall is preempted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq. (1982). We need not reach this issue.

Nevertheless, it must be remembered that the jury found the KWX rim not to present an unreasonable risk of harm by reason of design. In other words, the jury found, as of 1955, that neither the regular K-rim, nor the L-rim, nor the single-piece rim, was safer than the KWX.[9] The jury so found even though the L-rim was in regular use in 1955. As for the single-piece rim, its acceptance for heavy load trucks came gradually in later years as development on the larger tubeless tires progressed. Yet, in arguing punitive damages, Hodder argued the K-rim design was defective because both the L-rim and the single-piece rim were safer, and that Goodyear, therefore, should have put out K-rim warnings which said, "Do Not Use This Product."

In view of the finding of a nondefective KWX-rim design, we do not think the evidence is clear and convincing that Goodyear was willfully indifferent in not telling users not to use the K-rim at all. Only to the extent that Goodyear failed to warn users how to use the K-rim was the evidence clear and convincing of willful indifference.[10] Yet Hodder's counsel (who disclaims a recall cause of action) asked the jury (at a time, of course, when the defective design issue was yet unresolved) for $12,500,000 punitive

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[9] The trial court's instruction on defective design followed JIG 117, and required the jury, among other things, to balance "the likelihood of harm and the seriousness of that harm against the feasibility and burden of any precautions which would be effective to avoid the harm," and, to consider in the final balance, among other things, "[t]he availability of other and safer products to meet the same need."

[10] The issue here is not which kind of rim was better, but whether, if one rim was better, Goodyear was willfully indifferent, not only in failing to warn about the less safe rim, but in not withdrawing it for the more safe rim. Between 1955 and 1981 there was a gradual evolution in the relative merits of the various rims involving many complex considerations. Against this background and the jury's finding that the K-rim was not defectively designed, Goodyear's election not to recall used K-rims cannot be said to be willful indifference which meets the higher clear and convincing standard of proof.

damages based on the cost of recalling 250,000 K-rims at $50 each. The jury awarded $12,500,000. The conclusion is inescapable that the jury awarded appreciable punitive damages on a theory the jury itself had rejected.

We are persuaded, therefore, that the award of punitive damages cannot stand because of obvious error in the jury's calculations. We also conclude that justice is best served by reducing the punitive damages rather than by granting a new trial. *See Stanger v. Gordon*, 244 N.W.2d 628, 632 (Minn. 1976) (reduction rather than new trial given). When, as here, the issues of liability and compensatory damages have been fairly tried and need not be tried again, we would not want to grant a new trial on all issues; and we hesitate to grant a new trial on punitive damages alone, where the evidence of fault, now established, is yet again exhaustively presented to decide only the egregiousness of that fault. Furthermore, punitive damages do not "belong" to the plaintiff in the same sense as compensatory damages. Punitive damages are to punish the defendant, not compensate the plaintiff who has already been compensated. Indeed, some argue that the public should have more of a claim to collect a punitive award than the plaintiff. In any event, it is because of the unique, public aspect of punitive damages that the court exercises a much closer supervision over these awards than is the case with compensatory awards.

In determining the reduction, we look for proportionality between the egregious misconduct and the amount of damages, keeping in mind "those factors which *justly bear* upon the *purpose* of punitive damages." Minn. Stat. § 549.20, subd. 3 (1986) (emphasis added). Here, first of all, the award must be substantially discounted for the erroneous per-rim recall calculation. Secondly, while the focus is on the dangerous propensity of the K-rim to explode, the egregious misconduct must, under the jury's findings, be restricted to the inadequacies of the warnings; the product, itself, it must be remembered, was found not defec-

tive, neither in design nor manufacture, nor was there a complete failure to warn. It appears the jury, in punishing the defendant, may have included factors not "justly bearing" on punitive damages. Finally, the purpose of punitive damages needs to be kept in mind, namely, to punish and deter the conduct found to be willfully indifferent to the safety of others. We conclude, in this case, that an appropriate punitive damages award should be $4 million. The award, therefore, is reduced from $12.5 million to $4 million.

V.

Minn. Stat. § 176.061, subd. 6 (1981), divides a plaintiff employee's tort recovery between the employee and his employer roughly as follows: After deduction of expenses of collection, one-third is paid to the employee outright; the remainder is to reimburse the employer for compensation paid; and any balance remaining thereafter goes to the employee but with a credit to the employer against future compensation payable. Hodder challenges the trial court's application of the subdivision 6 formula to his recovery of compensatory damages. The parties agree punitive damages go to the employee outside the formula.

Under subdivision 7 of the statute, the employer has "a separate additional cause of action" against the third party tortfeasor for past and future medical expenses. Here Remer Oil was awarded $1,238,916 for past and future medical expenses and the trial judge excluded this sum from the subdivision 6 formula. Hodder claims this sum should have been included. We agree.

We have previously recognized the special, independent nature of the employer's statutory cause of action for medical expenses under subdivision 7. *See Travelers Ins. Co. v. Springer*, 289 N.W.2d 131, 133 (Minn. 1979); *see also Metropolitan Transit Comm'n v. Bachman's*, 311 N.W.2d 852, 854 (Minn. 1981). Under *Springer*, we held the em-

ployer's third-party claim for medical expenses exists when the employee is unable to sue the third party because the employee cannot meet the threshold requirements of the no-fault act for a tort action.

If the subdivision 7 action could be limited to medical expenses, the direct recovery Remer Oil urges might be appropriate as a narrow exception to the general application of the subdivision 6 formula.[11] In 1983, however, the legislature expanded subdivision 7 to cover not just medical expenses but "other compensation payable." 1983 Minn. Laws ch. 290, § 35. By this amendment, the legislature meant to extend *Springer* to ensure the employer's right to recover nonmedical compensatory benefits as well as medical expenses in instances where the employee's right to recover tort damages is barred by the no-fault act. *Allstate Ins. Co. v. Eagle-Picher Industries, Inc.*, 410 N.W.2d 324, 326-27 (Minn. 1987). We recognize, of course, that the 1983 amendment does not govern Holder's case, but if the pre-1983 statute is construed to exclude medical expenses from the subdivision 6 formula, it follows that the amended statute, in other cases, must exclude other compensation payable as well as medical expenses. Employers could in the future entirely bypass the subdivision 6 allocation by suing out their "separate additional" cause of action; if the subdivision 6 formula does not apply to any of the employer's subrogation interest, the employee

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[11] The subdivision 7 medical expense action was enacted in 1953, 1953 Minn. Laws ch. 755, § 6. Apparently the legislature was then reacting to *Dockendorf v. Lakie*, 240 Minn. 441, 61 N.W.2d 752 (1953), which had allowed the compensation insurer to recover its subrogation claim for benefits and medical expenses out of plaintiff employee's general, unsegregated verdict against the third-party tortfeasor. *See also* the follow-up opinion, *Dockendorf v. Lakie*, 251 Minn. 143, 86 N.W.2d 728 (1957). Since then the third-party action has been further modified and the current subdivision 6 allocation formula added. Over the years, except for *Springer*, the nature of the subdivision 7 action has not been examined and, in practice, has been treated ambivalently.

would no longer be assured of at least recovering for himself one-third of the tort recovery after expenses. Nor would employers have to share equitably in the employee's cost of recovery. We think this result is neither desirable nor was it intended.

We hold, therefore, that when, as here, the employee's tort action includes medical expenses separately asserted by his employer, nevertheless, the employer's recovery of medical expenses is subject to the subdivision 6 formula. This result respects the allocation of employer and employee rights inherent in the statutory scheme of section 176.061. In those instances where the employee does not or cannot maintain a third-party action, subdivision 7 continues to give the employer, as in *Springer*, the right to recover its benefits paid and payable. So, in this case, the entire $3,368,916 compensatory award is subject to allocation under section 176.061, subd. 6.

After calculating Hodder's attorney fees for the compensatory award,[12] the trial judge excluded costs taxed to Goodyear ($52,372.41) and prorated the remaining collection costs to exclude costs attributable to recovery of punitive damages. Exclusion of costs taxed to Goodyear was proper as Hodder did not have to pay them. Prorating the other legal costs was, however, incorrect, as we do not believe costs expended for establishing punitive damages and those for compensatory damages can be realistically separated in this case.

Under the subdivision 6 formula, after the employee receives his one-third share of the tort recovery outright, the employer is entitled to reimbursement for compensation benefits already paid from the remaining balance. Or-

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[12] Because we hold the entire compensation award is subject to distribution under subdivision 6, Hodder's attorney fees should be calculated for formula purposes from that amount rather than from the nonmedical compensatory award as in the trial court's calculation.

dinarily, this reimbursement is reduced by an amount representing the employer's proportionate share of the costs of the tort recovery.[13] Apparently because Remer Oil hired its own attorneys to represent its subrogation interests throughout the trial, the trial court did not reduce Remer Oil's reimbursement by its proportionate share of the employee's costs. This was incorrect.

Frequently, the plaintiff-employee conducts the entire tort litigation and the employer either does not have an attorney or its attorney does little or nothing to assist in the tort recovery. In such instances, we have said it is equitable for the employer, who is being reimbursed, to share part of the employee's collection costs. *Cronen v. Wegdahl Coop. Elevator Ass'n*, 278 N.W.2d 102, 104 (Minn. 1979). The equities are less clear where, as here, the employer's own attorney presents the employer's subrogation claim. Under a former version of subdivision 6, this court refused to make an employer "pay twice for its recovery of the subrogated interest" when the attorneys had agreed in writing that the employee's attorney did not represent the employee's interest and each attorney reached a separate settlement with the third party tortfeasor during joint negotiations. *Anderson v. Twin City Lines*, 289 Minn. 11, 16, 182 N.W.2d 193, 195 (1970). This case falls somewhere between *Cronen* and *Anderson*. While Remer Oil's attorney actively participated in the trial, he was partly defending against Goodyear's claim for *Lambertson* contribution. Also, Remer Oil's subrogation recovery depended heavily on Hodder's efforts, as indicated by Hodder's trial expenses of over $173,000 to Remer Oil's expenses of about

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[13] Subdivision 6(c) calculates the amount of reduction of the employer's reimbursement for costs of recovery as follows:

$$\frac{\text{cost of collection under subd. 6(a)}}{\text{total compensatory award}} \times \text{workers' compensation benefits paid by employer} = \text{amount of reduction}$$

$12,500. Moreover, the record shows no agreement between Remer Oil and Hodder on relative litigation responsibilities or allocation of fees and costs, although it occurs to us such agreements might be useful. On these facts, we think the equities lie with the employee and there is no justification for straying from the statutory formula which is intended "to ensure that those benefited by the recovery share equitably in the cost of obtaining that recovery." *Cronen*, 278 N.W.2d at 104. Remer Oil's reimbursement should be reduced by its share of the collection costs calculated under subdivision 6(c).

There is one last subdivision 6 correction. Any balance remaining after the employer's reimbursement "shall be paid to the employee or his dependents and shall be a credit to the employer" for benefits the employer has to pay in the future. The trial court assigned the full balance as Remer Oil's credit. We have previously held, however, that this balance must also be reduced by the employer's proportionate share of collection costs calculated by the ratio used in subdivision 6(c). *Kempa v. E. W. Koons Co.*, 370 N.W.2d 414, 420 (Minn. 1985); *Kealy v. St. Paul Hous. & Redevelopment Auth.*, 303 N.W.2d 468, 475 (Minn. 1981). The trial court erred in omitting this step.

Preverdict interest on pecuniary damages "shall be computed * * * from the time of the commencement of the action * * * except as provided herein." Minn. Stat. § 549.09, subd. 1(b) (1984). One of the exceptions is the offer-counteroffer provision. Under this provision, if the winning party's settlement offer proves to be closer to the judgment than the losing party's, the winning party gets preverdict interest from the start of the lawsuit. But if the losing party's offer is closer, the losing party pays less preverdict interest.[14] Goodyear challenges the trial court's application of the offer-counteroffer provision.

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[14] Minn. Stat. § 549.09, subd. 1(b) (1984), provides in relevant part:

On November 14, 1984, Hodder wrote Goodyear, claiming his compensatory damages alone, excluding punitive damages, were over $7.5 million and making a settlement demand of $7,507,522. Goodyear asked for clarification, including whether the demand figure included Remer Oil's workers' compensation subrogation claim. On December 27, 1984, Hodder confirmed by letter that its demand included Remer Oil's claim and insisted that it had a right to so claim. On February 11, 1986, Goodyear responded by letter, pointing out that Remer Oil had not joined in Hodder's demand and offered to settle Dale Hodder's claim under a *Naig-Pierringer* release for $750,000. Hodder argues Goodyear's counteroffer was untimely, not given within 60 days of his November 14 demand. Goodyear denies untimeliness and says its offer was closer to the $3.3 million compensatory verdict. Hodder, in turn, says his demand of $7.5 million was closer to the total judgment which included punitive damages. The trial court awarded Remer Oil prejudgment interest on its medical expense recovery from the date of commencement of the lawsuit

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(b) Except as otherwise provided by contract or allowed by law, pre-verdict or pre-report interest on pecuniary damages shall be computed as provided in clause (c) from the time of the commencement of the action, except as provided herein. If either party serves a written offer of settlement, the other party may serve a written acceptance or a written counter-offer within 60 days. After that time interest on the judgment shall be calculated by the judge in the following manner. The prevailing party shall receive interest on any judgment from the time the action was commenced * * * until the time of verdict or report only if the amount of its offer is closer to the judgment than the amount of the opposing party's offer. If the amount of the losing party's offer was closer to the judgment than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment, whichever is less, and only from the time the action was commenced * * * until the time the settlement offer was made. * * *

This law became effective July 1, 1984, with interest accruing from that date in any pending cause of action. 1984 Minn. Laws ch. 472, § 2.

and similar interest to Hodder on his nonmedical compensatory award. We affirm preverdict interest on the entire compensatory judgment but our analysis differs from that of the parties and the trial court.

Valid offers and counteroffers under section 549.09 must be in writing and must offer, in sufficiently clear and definite terms, to dispose completely the claims between the negotiating parties. The statute aims to promote settlements and this is best accomplished by offers which are straightforward and would in an effective and practical manner settle matters between the negotiating parties. Having said this, we recognize section 549.09 is ill-adapted to multi-party lawsuits,[15] particularly a plaintiff-employee's action against a third-party tortfeasor.

Here, Hodder has a personal injury claim. Remer Oil has a claim too, a special claim for workers' compensation paid and credit for compensation yet to be paid, recoverable out of the tort recovery, enforceable by a statutory right to intervene, yet subject to the subdivision 6 formula. Remer Oil also has an interest in defeating the third-party tortfeasor's counterclaim for *Lamberston* contribution which would diminish its subrogation recovery. It is evident that Remer Oil's subrogation claim cannot be a realistic candidate for settlement offers and counteroffers unless included within Hodder's settlement offer or unless Hodder has first settled his own claim separately on a *Naig* release. As a practical matter, Remer Oil's interests

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[15] *See* Note, *The Minnesota Prejudgment Interest Amendment: An Analysis of the Offer-Counteroffer Provision*, 69 Minn. L. Rev. 1401 (1985). Indeed, the note goes so far as to say it is arguable whether the offer-counteroffer provision applies to any actions involving more than two parties. *Id.* at 1425. We decline to take this route, although the legislature may perhaps wish to review the matter. Whether the offer-counteroffer device, requiring parties to take formal, fixed positions and gamble on which position will be closer to the final result, actually promotes settlements is perhaps another arguable proposition, but not one for us to answer.

are inextricably intertwined with Hodder's interests, and Hodder controls the settlement initiatives.[16] We hold, therefore, that in an employee's third-party tort action, for the purposes of the offer-counteroffer provision of the prejudgment interest statute, any offer must treat the employee and the employer as one party, and any settlement offer, to be valid, must encompass the interests of both the employee and the employer. This makes good sense. It requires, in the spirit of the statute, that settlement offers be made that will dispose of the entire claim against the third-party tortfeasor. True, the employee and employer may disagree on how to divide the settlement recovery between them, but this need not prevent them from agreeing on an aggregate settlement offer or counteroffer to present to or accept from the third party.

In this case Hodder did offer to settle both his claim and Remer Oil's claim for $7.5 million. Nevertheless, his offer was invalid because Remer OIl, apparently pursuing its own strategies, never joined in that demand. Goodyear was not required to respond to an offer where the offerors were not in agreement. Neither was Goodyear's offer of $750,000 to settle with Hodder, exclusive of Remer Oil's interest, a valid offer. While *Naig* settlements are appropriate, this piecemeal kind of settlement does not meet the requirements for a valid offer under section 549.09. For example, to what "judgment" must Goodyear's $750,000 offer be closest? And what if Hodder and Remer Oil had responded to Goodyear's $750,000 *Naig* offer with a valid offer to settle their joint interests for $7.5 million?

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[16] For example, *see Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977), and *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (1977), and their progeny. Because of the substantial conflict of interest between the employee and the employer, counsel for the plaintiff employee cannot presume to speak for the employer's subrogation claim. *See, e.g., Easterlin v. State*, 330 N.W.2d 704 (Minn. 1983); *Quarberg v. Laundry Store Sales, Inc.*, 269 Minn. 213, 214, 130 N.W.2d 340, 342 n. 1 (1964).

The offer-counteroffer provision of section 549.09 cannot function with offers which are not responsive to each other.[17]

We hold that no valid offer or counteroffer was made by any party in this lawsuit. Consequently, Goodyear must pay preverdict interest on the entire compensatory judgment.[18] Goodyear seems to argue that if *the claimant* makes no settlement offer, there can be no preverdict interest. This is incorrect. The general rule laid down by section 549.09 is that preverdict interest is computed from the time the action is commenced *unless* the offer-counteroffer

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[17] We should not be understood as saying that there must always be a counteroffer to activate the offer-counteroffer provision of the prejudgment interest statute. If, in this case, Goodyear had served an offer on Hodder and Remer Oil to settle their aggregate interests for a specific sum, that would have been a valid offer, and, if Hodder-Remer Oil had not responded with a valid offer, Goodyear's offer would stand alone and activate the preverdict interest reduction.

The court of appeals in *Kulkay v. Allied Central Stores*, 398 N.W.2d 573, 578 (Minn. App. 1986), held that the offer-counteroffer provision applies only if both parties make valid offers. We disagree. The provision applies whenever one party serves a valid offer. If the other party fails to respond or the response is invalid, the valid offer by default is closer to the judgment. This interpretation is borne out by the statute which says, "[*i*]*f either party* serves a written offer of settlement, the other party *may* serve a written acceptance or a written counter offer within 60 days." (Emphasis added.) If the purpose of the statute is to promote settlements, this is best accomplished by penalizing the party who fails to respond to a settlement overture or who makes an invalid offer.

[18] The statute does not allow preverdict interest on punitive damages, and, quite correctly, no claim for such interest has been made by Hodder.

Minn. Stat. § 549.09 was amended by 1986 Minn. Laws ch. 455, § 81 to bar preverdict interest on "judgments for future damages." This amendment does not "clearly manifest" an intent to be applied retroactively, and we hold it does not have retroactive effect. *See* Minn. Stat. § 645.21 (1987).

exception applies. No offers having been made, the exception does not apply, and the general rule governs.

Finally, the clerk neglected to tax interest on punitive damages from the date of the verdict. This should have been done. Minn. Stat. § 549.09, subd. 1(a) (1984). On remand, the clerk should add postverdict interest on the punitive damages award as reduced.

VII.

The judgment and orders appealed from are affirmed, except the case is remanded (1) to reduce the punitive damages award to $4,000,000; (2) to recalculate the allocation of the compensatory award between the employee and the employer under Minn. Stat., § 176.061, subd. 6, in accordance with this opinion and to revise the judgment (with preverdict interest on the whole thereof) accordingly; and (3) for the clerk to add postverdict interest to the punitive damages awarded.

Affirmed in part, reversed in part, and remanded with directions.

COYNE, Justice, took no part in the consideration or decision of this case.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419,
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company
et al, defendants, petitioners,
Appellants (C3-87-419)
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondents,

and

The Goodyear Tire & Rubber Company,
defendant and third party plaintiff, petitioner,
Appellant (C3-87-419),
Respondent (C2-87-511),

vs.

Remer Oil Company, Inc.,
third party defendant,
Respondent,

and

Pioneer Rim & Wheel Company
defendant and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party defendant,
Respondent,

Arrowhead Equipment Company,
third party defendant,

Respondent,

Itasca Tire Company, third party defendant,

Respondent.

ORDER

This court, having considered en banc the petitions for rehearing in the above entitled case,

IT IS HEREBY ORDERED:

1. In its petition for rehearing, Goodyear Tire & Rubber Company (as one of its arguments) calls our attention to an amendment to Minn. Stat. § 549.09, the pre-verdict interest statute, enacted by the 1988 legislature, effective April 13, 1988 "to all cases then pending." *See* 1988 Minn. Laws ch. 503, § 6. The "cases then pending" provision means that the 1988 amendment to subdivision 1, which relates only to the rate of interest, was to be effective April 13, 1988; contrary to Goodyear's contention, the "pending" language has no effect on the remainder of subdivision 1 allowing pre-verdict interest which was already in force and was left undisturbed by the 1988 amendment.

2. In all respects, the petitions for rehearing of Goodyear Tire & Rubber Company, Motor Wheel Corporation, and Remer Oil Company are denied and stay vacated.

3. No award of attorney fees pursuant to Minn. R. Civ. App. P. 140.03 is allowed.

4. The taxation of costs and disbursements by Goodyear Tire & Rubber Company and by Dale L. Hodder are hereby denied.

Dated: July 25, 1988.

BY THE COURT:

/s/ John E. Simonett
John E. Simonett
Associate Justice

COYNE, Justice, took no part in the consideration or decision of this case.

APPENDIX C

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,

Respondent,

vs.

Goodyear Tire & Rubber Company,

Appellant.

ORDER

WHEREAS, Goodyear Tire & Rubber Company has announced its intention to submit to the United States Supreme Court a petition for a writ of certiorari to review that portion of the judgment awarding punitive damages; and

WHEREAS, it has moved this court to stay execution or enforcement of that portion of the judgment relating to the punitive damages award and that the supersedeas bond remain in effect during the pendency of the appellate proceedings;

IT IS HEREBY ORDERED that the motion to stay execution or enforcement of that portion of the judgment awarding punitive damages be, and the same is, granted, for the limited period of time authorized for the filing of a petition for a writ of certiorari in the United States Supreme Court. Any application for a further extension of the stay shall thereafter be directed to the United States Supreme Court for its consideration pending disposition of that petition for the writ of certiorari. This stay shall not otherwise affect proceedings now pending in the Hennepin

County District Court in accordance with this court's decision filed on May 6, 1988.

Dated: 8-10-88

BY THE COURT:

/s/ John E. Simonett
Associate Justice

AUG 10 1988
FILED

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 793068 N

Dale L. Hodder,

Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,

Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,

Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc., a Minnesota corporation,

Third-Party Defendant.

FILED
JUL 25 1986

SPECIAL VERDICT

* * *

1. Was the KWX truck rim defective and unreasonably dangerous because of its design?

   ANSWER: YES __ No X

2. If your answer to question 1 was "yes," then answer this question:

Was such a defective and unreasonably dangerous design a direct cause of Dale Hodder's injuries?

ANSWER: YES __ No __

3. Was the Goodyear Tire & Rubber Company negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

ANSWER: YES X No __

4. If your answer to question 3 was "yes," then answer this question:

Was the Goodyear Tire & Rubber Company's negligence a direct cause of Dale Hodder's injuries?

ANSWER: YES X No __

5. Was Motor Wheel Corporation negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

ANSWER: Yes X No__

6. If your answer to question 5 was "yes," then answer this question:

Was Motor Wheel Corporation's negligence a direct cause of Dale Hodder's injuries?

ANSWER: Yes X No__

7. Was Remer Oil Company, Inc. negligent?

ANSWER: Yes X No__

8. If your answer to question 7 was "yes," then answer this question:

Was Remer Oil Company, Inc.'s negligence a direct

cause of Dale Hodder's injuries?

ANSWER: Yes X No__

9. Was Dale Hodder negligent?

ANSWER: Yes __ No X

• • •

13. Is Dale Hodder entitled to an award of punitive damages from Goodyear?

ANSWER: Yes X No__

14. If your answer to question 13 was "yes," then answer this question:

Amount of punitive damages: $12,500,000.00

15. Had the useful life of the KWX truck rim expired at the time of Dale Hodder's injuries?

ANSWER: YesX No__

16. If your answer to question 15 was "yes," then anwer this question:

Was Dale Hodder negligent for failing to determine that the useful life of the KWX truck rim had expired?

ANSWER: Yes__ No X

• • •

APPENDIX E

[13,955] Now, why is that important? It's important because they are big boys and they've got to have a big penalty or it won't make any difference to them. A couple of million dollars is nothing. It's a witness' pay. I mean it's so much money to us, but it's nothing to them. Now this—you've got to consider that.

Then the total effect. Okay, this is their only punishment, this is it. You people are it. You don't realize that yet. It's not just a conscience of this community, the whole nation is waiting to see what happens here, there's no question about it. They are waiting in the board room in Akron.

Why do you think all these people are sitting back here? Who are they that never got on the witness stand? You think this isn't important? It better be. Make it important to them.

You could punish them, sure, and you punish for past acts. Punitive damages is based on the past acts, the failure up to the time Dale Hodder got hurt to tell anybody, why didn't—

MR. HENDRICKS: Objection, Your Honor. That's improper argument on punitive damages.

[13,956] MR. RISJORD: No. it's a continuing failure to warn.

THE COURT: Sustained.

MR. RISJORD: Well, they are liable for a continuing failure to warn up to the time—

MR. HENDRICKS: Same objection, Your Honor.

MR. RISJORD: —Dale Hodder was injured.

MR. HENDRICKS: Outside the scope of the instructions and improper.

MR. RISJORD: No, it isn't; no it isn't.

THE COURT: Sustained.

MR. RISJORD: In any event, you've got to deter them, the instruction says deter Goodyear. Now, that's where you've got to consider how much.

What does deter mean? It means to stop this stuff, stop it. There's only one way you're going to stop it, and that's to make it too expensive to continue it, isn't it?

A corporation this size with this mentality of these particular people only understands that. They don't understand what you and I think of as—generally as ethics.

* * *

APPENDIX F

[13,680] THE COURT: I understand that counsel wishes to see me again on this matter, is that correct?

MR. FLASKAMP: I brought it up, Your Honor.

The original verdict form until this morning read, "Was Goodyear negligent?" and then you changed it to adopt the JIG-III instruction. The problem is that it's capable of two interpretations.

It's my understanding that the Court had ruled that if they learned later that they had a defective product or a dangerous product out in the system, that they then had a reasonable duty to warn. And Goodyear spent about three or four weeks of our time bringing on their advertising man and Pioneer Rim and Wheel and other witnesses to show that they were doing their best and utmost to warn the general public.

You can read No. 3 now because you have taken out the original negligence and gone to the JIG-III. The fact that that would be a warning that would—the obligation would terminate at the time it left their possession, which I don't think is the way that we have tired the case and the way that you have ruled on the case. So I am disturbed with the language of number 3. I know we want to get going to the jury, but we shouldn't I think blow this just for the sake of one more question.

[13,681] THE COURT: Well, Mr. Flaskamp—First of all, does anybody else have any comment about this situation?

MR. RISJORD: Your Honor, I do think that it—because what You are doing in the question is taking one sentence from the JIG instruction but not all of it, which obviously you couldn't very well, it does leave one with the impression that we are talking about a warning that had to accompany the product only, and a duty to discover the danger that would have had to precede the warning.

So we are not talking about a continuing duty to warn in the question, whereas I think the instruction is broad enough to include a continuing duty to warn.

The other problem with it is that they not only have an obligation to warn but to adequately instruct in use, safe use. There is no question but what the JIG instruction does have this sentence, which is fine, but it also goes further and elaborates more on warning than just this one sentence [13,682] about it being accompanied. So it intends to imply that there's no duty to instruct, because the question is related only to "accompanied by an adequate warning."

So for those reasons, we would join in Remer Oil's objection and assert our own further objection on the question of instruction. I think it was probably safer the way it was submitted more generally.

THE COURT; Thank you.

Mr. Hendricks.

MR. HENDRICKS: Judge, this is the safest way you can submit it. It's Minnesota law, it is JIG, and the strawhorses that the plaintiff and Remer are raising would just invite further error. I think it should conform to Minnesota law and conform to JIG, which this does.

THE COURT: Well, I think it does, and it will be given in that fashion.

* * *

APPENDIX G

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company et al., defendants and third party plaintiffs,
Appellants (C3-87-419),
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondent,

Remer Oil Company, Inc., third party defendant,
Respondent,

and

Pioneer Rim & Wheel Company, defendant and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party defendant,
Respondent,

Arrowhead Equipment Company, third party defendant,
Respondent,

Itasca Tire Company, third party defendant,
Respondent.

GOODYEAR'S PETITION FOR REHEARING (C3-87-419)

* * *

II. THE COURT DENIED GOODYEAR'S CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO DUE PROCESS BY HOLDING GOODYEAR LIABLE BASED ON A THEORY NOT SUBMITTED AT TRIAL.

The Court held that "a continuing duty to warn existed and was adequately submitted." The Court overlooked that Hodder specifically did not submit on a continuing duty to warn. Hodder stated, in reference to the JIG 119 instruction and the Special Verdict Form Questions on failure to warn: "So we are *not* talking about a continuing duty to warn." T. 13,681. The parties and the trial court did not consider the issue to have been submitted. The trial court specifically cited the instruction as a point-of-sale instruction in its orders. GY original App. 88. This Court noted that JIG 119 was drafted "with time-of-sale warnings primarily in mind" and that "it does not . . . declare what the law might be on that subject" [i.e., post-sale duties]. The Court cannot assume that the jury understood an instruction contrary to the trial court's and the parties' understanding and contrary to the plain language of the instruction.

Hodder's counsel submitted only on JIG 119 because JIG 119's "inapposite" language erroneously directed a verdict for him if the jury simply followed the instructions, which this Court must assume it did.[3] Hodder's counsel elected not to submit on continuing duty to warn as a matter of strategy perhaps because he learned for the first time at trial that Goodyear had *reached Remer* with safety warnings and offers of free safety films and free safety manuals. Perhaps it was because he had no expert testimony

[3] The Court overlooked that JIG 119 must be read in conjunction with the companion special verdict question. When so read, JIG 119's "inapposite" language directed a liability finding for Hodder.

on post-sale warnings or their distribution. Or perhaps it was because Remer testified it fully instructed Hodder in safety practices (T. 2751-53, 2756, 2758-59, 2764-5, 3051), and that it would have ignored (and did ignore) any warnings or instructions sent to Remer (T. 2914-15; D. Ex. 272B and D). JIG 119, because it was not a continuing duty to warn instruction, specifically directed the jury away from post-sale warning efforts. Hodder also knew that a continuing duty to warn had not previously been recognized in Minnesota and no pattern instruction existed.

But whatever the reason for Hodder's strategy decision, the point is that Goodyear was held liable by this Court under an unsubmitted theory. The Court overlooked that it erroneously gave Hodder a no-lose situation. It permitted Hodder to drop a theory he feared losing on at trial and on appeal it "reinstated" that theory and held Goodyear liable. This denied Goodyear a jury trial on this theory. *Schreiner*, 418 N.W.2d at 210.

This Court should take this opportunity to formulate and define an appropriate instruction in a post-sale duty case. Manufacturers are not absolutely liable when instruction manuals do not reach an employee, regardless of the actual warnings going to employers and regardless of the efforts made to distribute such manuals. A post-sale duty to warn cannot be defined in JIG 119's absolute terms. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks In The Road To A Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 895-96 (Oct. 1983). The Court has overlooked that failure to warn is based on negligence concepts and "is to be defined in terms of reasonableness". *Germann v. F. L. Smithe Machine Co.*, 395 N.W.2d 922, 926 n.4 (Minn. 1986); *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 622 (Minn. 1984); *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 274-275 (Minn. 1984). The Court should give guidance to trail judges and litigants on an instruction appropriate in a post-sale context.

Hodder should not benefit from his trial strategy based upon the improper assumption that the jury did not precisely follow the inapposite instruction. Article I, Section 4 of the Minnesota Constitution and due process principles under the Federal and state constitutions require a new trial under a properly defined, continuing duty to warn instruction.

III. IMPOSITION OF PUNITIVE DAMAGES FOR BREACH OF A CONTINUING DUTY TO WARN CONTRADICTS THIS COURT'S HOLDING IN *LEWIS v. EQUITABLE LIFE ASSURANCE SOCIETY.*

This Court recently held that Minnesota's punitive damages statute "should not be read to extend the availability of punitive damages to newly recognized causes of action. . . ." *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 891-92 (Minn. 1986). The Court reasoned that "[t]he concern of the legislature in enacting the punitive damages statute, section 549.20, was to limit the frequency and amounts of punitive damage awards." *Id.* The Court affronts its own proscription in *Lewis* when, for the first time, it recognizes a continuing duty to warn, and then imposes a $4 million punitive damages award based on the new cause of action.

Lewis mandates striking the punitive damages award. Like this Court, the *Lewis* court was presented with a question of first impression expanding a cause of action. *Compare Lewis*, 389 N.W.2d at 886 ("We have not previously been presented with the question of defamation by means of 'self-publication.' ") *with Hodder v. Goodyear Tire & Rubber Co.*, slip op. at 10 ("We have not had occasion to deal with [the question of whether a post-sale duty to warn exists] before.") And similar to this case, the *Lewis* court expanded the scope of an existing cause of action. *Compare Lewis*, 389 N.W.2d at 888 (expanded defamation action to include the concept of compelled self-publication should be "cautiously applied") *with Hodder* (expanded fail-

ure to warn action to include continuing, post-sale warnings which "arises only in special cases"). The *Lewis* court struck punitive damages.

Therefore, Goodyear's Petition for Rehearing must be granted because this Court overlooked and failed to consider the *Lewis* decision which is controlling on the punitive damages issue. *See* Minn. R. Civ. P. 140.01.

The principle embodied in *Lewis* is constitutionally demanded. Due process demands a party have clear and *prior* notice of the standard of conduct for which it may be subject to punishment. Here, Goodyear is being punished under standards of conduct that (1) did not exist in 1981, and (2) were not even submitted to the jury. The Court must reconcile this case with *Lewis* and strike the punitive damages award.

IV. IMPOSITION OF PUNITIVE DAMAGES REQUIRES DUE PROCESS AND OTHER CONSTITUTIONAL SAFEGUARDS THAT WERE NOT EMPLOYED IN THIS CASE.

Punitive damages are in the nature of a criminal penalty because the jury focuses on the defendant's conduct, not the plaintiff's injury. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Like criminal penalties, punitive damages have the same goals of punishment and deterrence. "They are not compensation for injury." *Id.* The trial court instructed the jury that it could assess punitive damages to *punish* Goodyear. Therefore, Goodyear should have been accorded basic procedural and other constitutional safeguards. *Bankers Life and Casualty Co. v. Crenshaw*, ___ U.S.L.W. ___ (U.S. May 16, 1988) (O'Connor, J., concurring) (Imposition of punitive damages without adequate procedural safeguards and standards raises "a due process issue that . . . is worthy of the Court's attention in an appropriate case. . . . [T]he Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits . . . [W]holly standardless discre-

tion to determine the severity of punishment appears inconsistent with due process.") *See also Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1984). The constitutional provisions implicated by the points stated in this petition are: the Sixth, Seventh, Eighth, and Fourteenth Amendments of the Federal Constitution and Article I, Sections 4, 5, 6 and 7 of the Minnesota Constitution.

V. THE COURT OVERLOOKED THAT IMPOSITION OF PUNITIVE DAMAGES BASED UPON A NEWLY-ANNOUNCED STANDARD OF LIABILITY IMPOSED RETROSPECTIVELY UPON GOODYEAR VIOLATES THE SIXTH AMENDMENT PRINCIPLE OF NOTICE AND FAIR WARNING AND DUE PROCESS PRINCIPLES OF THE UNITED STATES AND MINNESOTA CONSTITUTIONS.

This Court, *post-accident* and *post-trial*, expanded a manufacturer's duty to warn under Minnesota law to a post-sale warning distribution system. The Court's imposition of $4 million in punitive damages on a newly-recognized, unsubmitted standard of liability retroactively applied against Goodyear is abhorrent to any notion of fundamental fairness and due process of law.

A. Imposition Of Punitive Damages For 1981 Conduct Held To Violate A Post-Sale Duty To Warn First Recognized in 1988 Violates Due Process And Sixth Amendment Principles Of The Federal And Minnesota Constitutions.

The Due Process Clause of the Fourteenth Amendment, the Sixth Amendment and the parallel clauses in the Minnesota Constitution require that Goodyear have clear and *prior* notice that certain conduct is proscribed before it can be punished for that conduct.[4] Goodyear had no fair

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[4] This fundamental right is also at the heart of the prohibition against *ex post facto* laws, a principle held to be embodied in the Due Process

warning in 1981 that its warning distribution system was illegal or even inadequate. Even JIG 119, drafted after 1981, did not "declare what the law might be on [this] subject." Goodyear could not have ascertained from Minnesota law in 1981 that it had a continuing duty to warn or what the standard of conduct was in order to satisfy this duty.[5] Essentially, Goodyear has been "convicted" and fined $4 million for violating a "law" that did not exist at the time of the accident. Certainly, the law was not defined by any clear standards of conduct announced by Minnesota courts at any time prior to 1981.

A reading of Minnesota precedent pre-1981 compels the conclusion that the standards under which the $4 million

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Clause. *Marks v. United States*, 430 U.S. 188, 191 (1977) ("the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty"); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred', [citation omitted], must apply to bar retroactive criminal prohibitions emanating from courts as well as legislatures."); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985), (*Ex post facto* principles "may be applied in civil cases where the civil disabilities disguise criminal penalties").

[5] A rule of law "which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Where, as here, an essentially criminal penalty is imposed, "the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983).

> "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws [and] enables individuals to conform their conduct to the requirements of law . . . ." *Roberts*, 468 U.S. at 629.

penalty was assessed were nonexistent when Goodyear's alleged willfully indifferent conduct occurred.[6] Compounding this fundamental constitutional oversight, the continuing duty to warn theory was not even submitted to the jury in this case and, therefore, could not be the basis for the punitive damages imposed. The Court, therefore, overlooked Goodyear's constitutional rights when it retrospectively imposed in 1988 a new standard of liability for 1981 conduct. Significantly, punitive damages were imposed in "hindsight", not for concealing a danger or marketing a defective product, but for the Court's ill-advised and unsupported judgments about the adequacies of Goodyear's warning distribution efforts which admittedly did *reach* Remer.

B. Imposition of Punitive Damages Premised On An Underlying Liability Instruction That Contained "Inapposite" Language And Did Not "Declare What The Law Might Be On That Subject" Is Standardless And Unconstitutional Punishment.

Here the Court imposed punitive damages upon an underlying liability (post-sale duty) never submitted to the jury. Moreover, as this Court stated, the JIG 119 instruction upon which the jury premised liability "does not . . . declare what the law might be on that subject." The Court violated due process by imposing punitive damages where the jury received no clear instruction on the nature of the underlying duty.

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[6] In *Balder v. Haley*, 390 N.W. 855 (Minn. App. 1986), *rev'd* 399 N.W.2d 77 (Minn. 1987), the Court of Appeals recognized that the trial court (which also saw that JIG 119 was inadequate) explicitly instructed the jury on a continuing duty to warn about a defective product. The point again is that in 1981, the time of Goodyear's alleged actionable conduct, a continuing duty to warn had never existed in any form under Minnesota law.

VI. THE COURT FAILED TO CONSIDER THAT THE UNCONSTITUTIONALLY VAGUE SECTION 549.20 AND THE VAGUE, STANDARDLESS PUNITIVE DAMAGES INSTRUCTION VIOLATED GOODYEAR'S DUE PROCESS RIGHTS UNDER THE FEDERAL AND MINNESOTA CONSTITUTIONS.

The vague punitive damage instruction, based on Section 542.30, itself compounded the constitutionally impermissible imposition of punitive damages premised on a newly-recognized duty and on an inapposite liability instruction. The trial court's punitive damage instruction provided:

> If you find by clear and convincing evidence that the acts of Goodyear show a willful indifference to the rights or safety *of others*, then you may, in addition to the other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish and deter Goodyear *and deter others* from the commission of like acts. (Emphasis added).

Conspicuously absent from the instruction is any reference to Goodyear's acts *toward Hodder*. Likewise, absent from Minnesota's punitive damage statute, section 549.20, is the requirement that the punishable conduct be tied to the conduct causing injury. Incredibly, the instruction and the statute permit the jury to assess punitive damages against Goodyear for its alleged willful indifference to the safety of *anyone* at any other time, *even if it believed that Goodyear acted utterly without any willful indifference to the rights and safety of Hodder in 1981*. Such a preposterous result speaks contrary to every conceivable notion of justice and fairness embedded in our system of laws. Such a standardless instruction patently violated Goodyear's due process rights.

The instruction did not focus the jury's attention on Goodyear's conduct toward Hodder.[7] It did just the op-

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[7] The trial court's vague punitive damage instruction failed to link

posite. An award of punitive damages on that basis is the same as convicting one for crimes other than the one with which he is charged, a clear violation of due process of law. *See Gertz*, 418 U.S. at 350. *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979).

The constitutional infirmities in the instruction are amplified when considered in light of the Court's "finding" that Goodyear was willfully indifferent in its warnings distribution efforts. Significantly, the irrebuttable evidence was that, through Goodyear's distribution efforts, warning literature and information reached Hodder's employer—a small service station in Remer, Minnesota, population 149. Thus, under the Court's reasoning, Goodyear is liable for punitive damages because its warning distribution efforts were "inadequate," even though they were adequate to reach Hodder's employer who, admittedly, disregarded them because he felt that he knew of the dangers of multipiece rims, T. 9430, 2914-15, 8886-99. Thus, the standardless punitive damages instruction violated due process because it allowed this Court to impose punitive damages for conduct other than conduct that caused Hodder's injuries. The jury's errant assessment of $12.5 million for not recalling a non-defective 26-year-old distorted product in use beyond its useful life demonstrated the constitutional infirmities of the standardless and vague punitive damage statute and instruction.

VII. THE COURT'S IMPOSITION OF $4 MILLION IN PUNITIVE DAMAGES DEPRIVED GOODYEAR OF ITS RIGHTS TO TRIAL BY JURY AND DUE PROCESS.

Article 1, Sections 4, 6, and 7 of the Minnesota Constitution and the Sixth, Seventh, and Fourteenth Amend-

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the acts for which the jury could punish Goodyear to those "which directly caused actual injury or damage to the plaintiff." Alsop & Herr, *Punitive Damages In Minnesota Products Liability Cases: A Judicial Perspective*, 11 Wm. Mitchell L. Rev. 319, 346 (1985) (Appendix A: Punitive Damage Charge).

ments to the Federal Constitution each guarantee the right to trial by jury and due process. Goodyear's right to a jury trial and due process were violated when the Court imposed $4,000,000 in punitive damages on a theory other than that which the jury erroneously imposed punitive damages. Thus, the award of punitive damages must be stricken or a new trial must be ordered.

Although the Court properly recognized that "punitive damages cannot stand", it nonetheless improvidently awarded punitive damages and declined to grant a new trial. The Court, assuming a function that a jury must perform, attempted to independently evaluate the record.

This Court characterizes its assessment of $4,000,000 in punitive damages as a reduction. The jury's error, however, went to *liability* for punitive damages: "It appears that the jury, in punishing the defendant, may have included factors not justly bearing on punitive damages." Further, the Court noted that "punitive damages cannot stand." Goodyear, therefore, respectfully and most vigorously disagrees with this Court's characterization. What the Court did was not a reduction, but an independent assessment. Hodder's counsel sought precisely $12,500,000 in punitive damages on a theory this Court has now determined to be inconsistent with the jury's liability finding of no defective design.[8] The jury awarded $12,500,000 in punitive damages. It, therefore, cannot be credibly main-

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[8] The hallmark of Hodder's punitive damage theory was recall. This subject occupied *days* of evidence (e.g., Hutchinson's depositions) and was the crux of Hodder's closing argument for punitive damages. T. 13,950-58. Failure to recall was the act that Hodder tried and argued as being willful. The issue Goodyear raised on appeal was that a failure to recall was, as a matter of law, an improper theory to support punitive damages. This error went to the *basis* of the punitive award. The Court improperly re-examined the record to support its independent assessment of punitive damages in violation of Goodyear's right to jury trial guaranteed by the Sixth and Fourteenth Amendments and the Minnesota Constitution.

tained that the jury awarded even $1 based on Goodyear's alleged willful indifference in distributing warning literature especially since JIG 119 "does not . . . declare what the law might be" on postsale warning duties.

In *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 47 (2d Cir. 1984), the trial court reduced a $7 million verdict to $4 million based on its calculation of what a properly functioning jury would have awarded. *Id.* a 48. The Second Circuit held it was improper "for the district judge . . . to make his own calculation of the plaintiff's damages." *Id.* at 49.

> [Where] prejudicial error has infected the jury's entire consideration of plaintiff's pecuniary loss . . . it is impossible to preserve a portion of the jury's verdict . . . by starting with the jury's verdict and cutting it down. Instead, one must proceed to calculate damages from zero and build up. While this distinction may seem purely semantic, it is not since building a damage award for pecuniary loss from zero disregards the jury's verdict entirely and *deprives defendants of their right to trial by jury.* We must, therefore, remand for a new trial. *Id.* at 50 (emphasis added).

The instant case fits squarely within the *Shu-tao* holding. *Shu-Tao* teaches that it deprives defendant a jury trial for a court to independently impose its own punitive damages award—precisely what this Court did here.

VIII. THE COURT DENIED GOODYEAR A JURY TRIAL ON WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT ITS DISTRIBUTION OF WARNINGS SHOWED WILLFUL INDIFFERENCE.

The Court identified the punitive damage issue to be "whether Goodyear's *inadequate distribution* of K-rim warnings was willfully indifferent" after finding that "Goodyear did warn, and its warning message, insofar as content, was generally adequate." The evidence must be

clear and convincing. Minn. Stat. Ann. § 549.20 (1986). The question obviously calls for a factual finding and the Federal and Minnesota constitutions guarantee Goodyear that a jury, not an appellate court reviewing a cold record, be allowed to make or not make that finding after being correctly and clearly instructed on the underlying duty upon which punitive damages are premised.

A. The Court Misstated And Omitted Facts In Its Evaluation Of The Record.

The Court's imposition of punitive damages based upon its misreading of the record illustrates the dangers when the right to jury trial is abridged and the Court fails to acknowledge that it "is not empowered to make . . . findings of fact. . . ." *Lumpkin v. North Central Airlines, Inc.*, 209 N.W.2d 397, 401 (Minn. 1973). Numerous misstatements occur throughout the opinion. The Court asserts, for example, that Goodyear withheld accident reports from DOT and that it mispresented the reason for discontinuing K-rims. This never occurred. There is not one shred of evidence in the record, let alone clear and convincing evidence, to support this statement. Goodyear is at a loss as to what evidence the Court is referring when it makes this unsupported, conclusory "finding of fact".

Significantly, this identical, specious allegation by Hodder's counsel was designated a specific "Common Issue" and thus subject to three years of intense litigation in the consolidated, multidistrict federal proceeding "MDL 362." Judge William R. Collinson in MDL 362 studied and analyzed hundreds of pages of record and hundreds of documents bearing on Hodder's counsel's allegation that Goodyear withheld accidents and misrepresented matters to the DOT. After an exhaustive review, Judge Collinson found *as a matter of law* that there was *no evidence* "to support the allegations that Goodyear withheld any information from NHTSA" and struck the "Common Issue" allegation.

Goodyear is shocked that this Court would "decide", on appeal, without reviewing one percent of the DOT records, without reviewing the long history of Goodyear's correspondence and work with the DOT, and without reviewing the relevant testimony that the baseless withholding allegation is "evidence" supporting punitive damages. An absolutely baseless allegation became a "finding of fact" on appeal, which this Court was not empowered to make, that will be unjustly cited against Goodyear in subsequent cases. *See Lumpkin*, 209 N.W.2d at 401. Incredibly, this Court cites the same conclusory allegations and unsupportable distortions that a federal court found baseless as "clear and convincing evidence." This Motion for Rehearing should be sustained and the opinion withdrawn to allow Goodyear to demonstrate to the Court that its conclusory "finding" was erroneous and a misreading of the record.

The Court's implication that Goodyear undertook no warning efforts until 1974-75 and then budgeted $100,000 per year for that purpose is erroneous. Not one piece of evidence of Goodyear's expenditures was introduced at trial. The figure the court picked up was for Motor Wheel alone. Motor Wheel spent $100,000 to $150,000 on its mass mailing programs alone each year in the 1970s; however, total Motor Wheel expenditures on warning efforts were much higher. Also, Goodyear itself has warned about the dangers in servicing all truck rims since the 1930s and greatly expanded its warning efforts after several safety studies of the early 1970s. All truck rim manufacturers (Firestone, Budd, Goodyear, Motor Wheel and others), the DOT, and trade associations, such as the RMA and NWRA, *funded* by the manufacturers such as Goodyear, greatly expanded their warning efforts in the 1970s because of a genuine concern for safety.

Finally, the Court overlooked that Goodyear had its own expenditures for warning distribution. One example is that Goodyear paid for the production and distribution of its safety film. D. Exs. 234 and 272E (p. 180). Hodder did

not introduce any expert testimony on warnings or necessary expenditures for their distribution. No testimony exists that Goodyear's or Motor Wheels' warning distribution program was inadequate. No evidence exists that Goodyear had any knowledge that its system was inadequate.

B. The Court's Basis For Punitive Damages Is Inconsistent With Its Holding.

The Court states that "Goodyear balked at the government's request for a voluntary recall and instead pushed for OSHA regulations" as support for its assessment of punitive damages. Later in the opinion, the Court states (footnote 10), "Goodyear's election not to recall used K-rims cannot be said to be willful indifference . . ." Goodyear's response to Bradford's recall letter had to take the form it did because the K-rim is not defectively designed, as the jury found and as the government also found at the end of IR-215 (the only NHTSA investigation of the K-rim). The jury's finding supports Goodyear's position. Yet, the Court illogically cites this, at one point, as "clear and convincing evidence" of willful conduct. Also, the Court itself held that punitive damages based on a failure to recall theory "cannot stand", but it inconsistently implies that Goodyear's valid, good faith response to Bradford's informal and erroneously premised recall request supports a punitive damages award.

The Court claims that Goodyear was willfully indifferent because it did not set out the OSHA standard in its catalogs until 1983. The Court has overlooked that, through the RMA, Goodyear had immediately published and massively distributed a hard cover safety manual setting out the OSHA standard. D. Ex. 42 (a few illustrative pages of the exhibit are attached). The trial court excluded this evidence because it contained the OSHA standard and, amazingly, the Court now finds punishable conduct for not quickly distributing the OSHA standard although D. Ex.

42 would have proved the opposite. Goodyear also led government committees designing DOT posters citing the OSHA standard. DOT, Firestone, OSHA, and others distributed these posters, and Goodyear, at its own expense, conducted massive mailings of these DOT posters. Because Goodyear and others used a safety manual and posters to publicize the OSHA standard does not show willful indifference.

IX. THE COURT IMPOSED AN UNCONSTITUTIONAL EXCESSIVE FINE FOR CONDUCT WHICH WAS BLAMELESS, OR NEGLIGENT AT BEST.

The Eighth Amendment of the Federal Constitution and Art. I, Section 5 of the Minnesota Constitution prohibit the imposition of excessive fines. The Court's imposition of a $4 million punitive damages award was unconstitutionally excessive because Goodyear's allegedly indifferent conduct bespeaks only of negligence at best.

The punitive damages issue as framed by the Court—"whether Goodyear's inadequate distribution of K-rim warnings was willfully indifferent"—was not supported by facts in the record. Of the "facts" which the Court apparently found to support the punitive damages award, only three can be logically connected to Goodyear's warnings distribution: 1) "Goodyear's sales representative visited only 26 towns in all of northern Minnesota with literature on K-rim dangers," 2) Goodyear assumed "OSHA's program absolved it of pursuing a vigorous program of its own,"[9], and 3) "in large part, Goodyear left the initiative to tire shops to write in for safety material in response to its ads." Further examination of those "facts"

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[9] Incongruously, the Court concludes that Goodyear's "warning message, insofar as content, was generally adequate," but later appears to find some fault with the warnings' content. The content of the warning message cannot be deemed to show willful indifference to the safety of others because the Court found it to be "generally adequate."

magnifies the groundlessness and, therefore, excessiveness of the Court's punitive damages award.

The "Goodyear sales representative" referred to in the Court's opinion was not Goodyear's representative but that of the defendant Pioneer Rim and Wheel. Using the actions of another party's salesmen, over which Goodyear had no control, to show willful indifference violates Minn. Stat. § 549.20(2). Punitive damages cannot be based on the acts of other parties. Moreover, Pioneer's salesmen did leave safety instructional materials in nearby towns and tire service shops, and the fact that the salesmen omitted to stop at Remer (a town of 149) indicates, at best, negligence.

As the Court recognizes, Goodyear's efforts to pass OSHA regulations governing multipiece rim servicing "shows the opposite of indifference." Yet, it incongruously finds Goodyear indifferent because it assumed that OSHA's program absolved it of pursuing a vigorous warning program of its own. Contrary to the Court's "finding", Goodyear did pursue a vigorous warning program of its own. In any event, Goodyear, in good faith, believed, as did the DOT and the experts giving public testimony to support a regulatory standard, that OSHA regulation of workplace safety was the effective way to reduce rim servicing accidents. Indeed, Goodyear's warning efforts did reach Remer, and the OSHA Standard directly and immediately led to a wholly remarkable and greatly successful reduction in rim accidents. App. 15.

Finally, the statement that "in large part" Goodyear relied on safety ads to reach tire shops with its warnings is erroneous. Goodyear, as well as other manufacturers, mailed massive amounts of warning literature to tire shops, vocational schools and other sites where rims were known to be serviced; distributed safety films; caused its trade organizations to produce manuals and distribute them; and supported the DOT and OSHA in mailing warning mate-

rials Goodyear helped design. Goodyear justifiably assumed that vocational schools, insurance companies and responsible employers, who teach tire/rim servicing safety, would use and follow the safety materials and equipment that DOT, Goodyear, Firestone and others make readily available and OSHA required.

Safety ads were intended to reach, and did reach, places like Remer that are not tire shops and may be inadvertently missed. Tire shops are and have been flooded with warning and safety materials from many sources including Goodyear. Remer, however, was a gas station which never had commercial contact of any nature with manufacturers like Goodyear. After consulting with experts in the field of warning distribution, Goodyear reasonably concluded that advertising in trade journals to which employers like Remer would likely subscribe or read was the best way to facilitate widespread distribution of its warning literature to even those places, like Remer, that may otherwise be missed. Goodyear certainly is not willfully indifferent because it put safety ads in trade journals as one part of its multi-faceted warning program.

Even assuming Goodyear's judgment could be construed, in retrospect, to be erroneous (although it cannot), it hardly bespeaks "maliciousness [or] an intentional or willful failure to inform or act" necessary for the imposition of punitive damages. *Wikert v. Northern Sand and Gravel, Inc.*, 402 N.W.2d 170, 183 (Minn. App. 1987); *American Cyanamid Co. v. Roy,* 498 So. 2d 859, 862 (Fla. 1986).

Where a defendant's conduct is nothing more than negligent, it is "an inappropriate occasion for awarding punitive damages under any formula." *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 53 (1979) (Blackmun, J., concurring). Thus, this fine was imposed in violation of the Eighth Amendment and Art. I. § 5 of the Minnesota Constitution.

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APPENDIX H

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

No. 793068—7PI

Dale L. Hodder,

Plaintiff,

vs.

The Goodyear Tire & Rubber, Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation,

Defendants.

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and The Motor Wheel Corporation, an Ohio corporation,

Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc.,

Third-Party Defendant.

GOODYEAR AND MOTOR WHEEL'S BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE COURT'S FINDINGS, FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

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Punitive damages are in the nature of a criminal penalty because the jury focuses on the defendant's conduct, not the plaintiff's injury. *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*, 329 N.W.2d 306, 312 (Minn.

1982). Indeed, the Court instructed the jury that it could assess punitive damages to *punish* Goodyear. *Accord Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied sub nom., Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980). Therefore, Goodyear should have been accorded basic procedural safeguards. Ghiradi & Kucher, *Punitive Damages L. and Prac.* § 3.03 (1984).[13]

However, the Court's punitive damage instruction effectively stripped away Goodyear's right to due process that it should have regained under Minnesota constitutional and statutory law. The instruction simply did not focus the jury's attention on Goodyear's conduct toward the plaintiff, Dale Hodder. Rather, it gave the jury free rein to punish Goodyear for alleged willful and wanton conduct toward anyone who worked on truck rims between the 1950's and the present even though such conduct could not possibly have been related to and could not possibly have caused plaintiff's injury. An award of punitive damages on that basis is akin to convicting an individual for crimes other than the one with which he is charged, a clear violation of due process of law. The Court's instruction directing the jury to award punitive damages if it found that "Goodyear show[ed] a willful indifference to the rights and safety *of others*" violated Goodyear's right of due process of law guaranteed by the United States and Minnesota constitutions.

By giving a punitive damage instruction permitting punishment for conduct relating to others, the Court violated the basic principles of Minnesota law, cited above, that there is no separate cause of action for punitive damages

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[13] The clear and convincing standard, which changed the common law preponderance of the evidence standard, imposed by the Minnesota legislative was an obvious recognition of the criminal nature of punitive damages and an attempt to provide part of the necessary procedural safeguard to products liability defendants. Minnesota-Iowa Television v. Watonwan T.V. Improvement Assn., 294 N.W.2d 297, 310-11 (Minn. 1980).

and that the award of punitive damages must be premised only on the same conduct giving rise to underlying liability. *Jacobs*, 377 N.W.2d at 445; *Miexner*, 3 N.W.2d at 757.

Furthermore, the Court denied Goodyear's right of due process when it admitted evidence and arguments, without any factual basis, spanning two and one half decades of alleged misconduct which was completely unrelated to the failure to warn issue, to Goodyear's conduct toward plaintiff, or to the cause of plaintiff's injuries.

* * *

APPENDIX I

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company et al., defendants and third party plaintiffs,
Appellants (C3-87-419),
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondent,

Remer Oil Company, Inc., third party defendant,
Respondent,

and

Pioneer Rim & Wheel Company, defendant and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party defendant,
Respondent,
Arrowhead Equipment Company, third party defendant,
Respondent,
Itasca Tire Company, third party defendant,
Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX
(C3-87-419)

* * *

D. THE TRIAL COURT'S IMPOSITION OF A PUNITIVE FINE VIOLATED GOODYEAR'S RIGHT TO DUE PROCESS.

Imposition of punitive damages in the absence of sufficient standards also implicates due process concerns "which in an appropriate setting must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986) (Burger, C.J.). *See generally* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983). Fundamental fairness allows punishment only for conduct contrary to well-defined standards. Because Hodder did not request a recall instruction and no supposed recall standards were tied to the punitive damage instruction, the jury was allowed to punish Goodyear for undefined conduct.[24]

Due process requires that Goodyear have notice that certain conduct is proscribed before it can be punished for that conduct.[25] Section 549.20 should not be used to extend punitive damages to newly recognized causes of action.

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[24] Because it was not tied to any defined elements, the vague punitive damages instruction allowed punishment for conduct towards "others" and allowed the jury to consider injuries in 134 other accident claims (Part VI.A., *infra*) as a basis of punishment. *See Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981), *overruled on other grounds, Dura Corp. v. Harned*, 703 P.2d 396, 405 n.5 (Alaska 1985) (error to permit punishment "for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff"). The trial court permitted the jury to speculate on the complex subject of recall without having any guidelines and without tieing those guidelines to Hodder's claim. Goodyear could properly only be punished for invading Hodder's rights, not for invading the undefined rights of "others." *Unified School District No. 490 v. Celotex Corp.*, 629 P.2d 196, 213 (Kan. App. 1981) (Rees, J. concurring).

[25] The corollary to the notice requirement of the Due Process Clause in the fourteenth amendment is the prohibition against *ex post facto* laws in Art. I, § 10: "No state shall . . . pass any . . . *ex post facto* law. . . ."

Lewis, 389 N.W.2d at 89-92; *see* Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 57 (1985-86) ("although manufacturers and others can determine after the fact that certain types of conduct will result in punishment, the requirement that they be given a clear idea of proscribed conduct *in advance* is not satisfied"). Goodyear had no notice of a legal duty to recall a non-defective product being used beyond its useful life. Punitive damages were the impermissible "loose cannon on the legal deck," *Jacobs*, 377 N.W.2d at 445, and violated Goodyear's due process rights. They must be stricken.

* * *

APPENDIX J

PUNITIVE DAMAGES

If you find by clear and convincing evidence that the acts of Goodyear show a willful indifference to the rights or safety of others, then you may, in addition to the other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish and deter Goodyear and deter others from the commission of like acts.

Clear and convincing evidence means that the evidence must lead you to conclude that it is highly probable that Goodyear acted with willful indifference to the rights or safety of others. Put another way, the evidence must produce in your minds a firm belief or conviction that Goodyear acted in willful indifference to the rights or safety of others.

Willful indifference means that Goodyear acted in deliberate disregard to the rights or safety of others.

If you determine that punitive damages should be awarded, you should consider factors relating to the purpose of punitive damages in determining the amount, including, but not limited to, the following factors:

1. The seriousness of the hazard to the public arising from Goodyear's misconduct.
2. The profitability of the misconduct to Goodyear.
3. The duration of the hazard and of its excessiveness.
4. The attitude and conduct of Goodyear upon discovery of the misconduct.
5. The number and level of employees involved in causing or concealing the misconduct.
6. The financial condition of Goodyear.
7. The total effect of other punishment likely to be imposed upon Goodyear as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons.

You may award punitive damages against a company because of an act done by an employee only if you find that:

1. The company authorized the doing and the manner of the act; or
2. The employee was unfit and the company was reckless in employing him; or
3. The employee was employed in a managerial capacity and was acting in the scope of employment; or
4. The company or managerial employee of the company ratified and approved the act.

APPENDIX K

549.20. Punitive damages

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing the agent, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing he misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Laws 1978, c. 738, § 4, eff. April 5, 1978. Amended by Laws 1986, c. 444.

Historical Note

Laws 1978, c. 738, § 11. provides that this section is effective April 15, 1978, and applies to all causes of action arising on or after that date.